Limited Circulation

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

1997, No. 198 and 200 (Consolidated)

(Civil)

Civil Appeal No. 198/97

BETWEEN

THANG THIUE QUYEN	3rd Applicant
HO QUAY NGUYEN	7th Applicant
CHU MING HONG	37th Applicant
HOANG VIET SINH	96th Applicant
TRAN HOA BUU	103rd Applicant
TUONG CAN QUANG	106th Applicant
DIEP MINH QUANG	117th Applicant
and	
THE DIRECTOR OF IMMIGRATION	1st Respondent
THE SUPERINTENDENT OF HIGH ISLAND DETENTION CENTRE	2nd Respondent

Civil Appeal No. 200/97

BETWEEN

LONG QUOC TUONG and others	1st Applicant
and	
THE DIRECTOR OF IMMIGRATION	1st Respondent
THE SUPERINTENDENT OF HIGH ISLAND DETENTION CENTRE	2nd Respondent

---

Coram: Hon Mortimer V-P, Godfrey and Rogers JJA in Court

Dates of Hearing: 11 and 12 December 1997
Date of Judgment: 12 December 1997

J U D G M E N T

Mortimer V-P:

~~*Civil Appeal No. 198 of 1997*~~

Following an application for a writ of *habeas corpus* on behalf of the seven applicants, on 26 September 1997 Keith J allowed the application and ordered their release from detention. The Director of Immigration appeals against his orders.

The background

The applicants are known as ex-China Vietnamese illegal immigrants, that is an Immigration Department classification to indicate that they once resided in Vietnam but since have settled in China before coming to Hong Kong to~~and~~ claim~~ing~~ refugee status. There is~~After~~ a complicated history, during which the Director of Immigration previously~~was~~ attempted~~ing~~ to resettle each of the applicants back to China.

~~-~~At the time of the proceedings below, they were subject to orders by the Director of Immigration under s. 13E(1) of the Immigration Ordinance, Cap. 115 to remove them from Hong Kong to Mainland China. The making of such order gave rise to a power of detention pending their removal under s. 32(1)(a) under which they were held.

The person who is detaining an applicant in proceedings such as this must make a return in which he specifies his~~e~~ legal authority and power to hold that person~~.~~ – in this case, the Director of Immigration relies upon the two sections to which I have referred.

The basis of the proceedings is an inquiry into the legal validity of the jailer's authority. With the leave of a judge, the returns in the case of the applicants have been amended. So, it was on those amended returns that the case was heard.

At the time of the hearing, the case ~~was~~ of the first six applicants fell into one category. So the judge dealt with them together. The case of the 7th requires separate consideration. So far as this appeal is concerned, the same applies. I turn to the first six to whom I will refer as the applicants.

The history

I cannot equal the clarity of Keith J's account of the history of this matter in his judgment. ~~and~~ I gratefully adopt~~ed and quote from~~ it:

> "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, he 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 judge ~~went on~~ then ~~to correctly~~ identified the issue which was before him. He said:

"… since this is an application for *habeas corpus*, I am only concerned with whether their current detention is lawful."

That, of course, depended upon the two sections to which I have made reference.

Those sections read:

"13E. Removal from Hong Kong of Vietnamese refugees and persons detained under section 13D

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

(2) An immigration officer or a chief immigration assistant may remove from Hong Kong in accordance with section 24 any person ordered to be removed from Hong Kong under subsection (1)."

That power was exercised and it~~then~~ triggered the power to detain under s. 32(1) :

"32(1) A person who is to be removed from Hong Kong under section 18 or 13E–

(a) may be detained until he is so removed, …"

The decision below

Miss Gladys Li~~ee~~ SC who appears both here and below for the applicants submitted that applying and legitimately extending the principles in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 the statutory power to detain could no longer be exercised.

~~-~~The judge ~~approached this and~~ set out, so far as he considered them to apply, the principles in *Hardial Singh*. Miss Li submitted that the applicant's detention would have come to an end long ago if their requests for permission to remain in Hong Kong had been properly considered and determined. Therefore, the current detention was unlawful. This submission was accepted by the judge who ~~then~~ conducted a detailed inquiry into the facts relating to each applicant. He decided that each applicant indeed would have been released from custody and would have been returned to China or elsewhere long ago if he had been dealt with appropriately. On this basis, he decided that the exercise of the power to detain under the section was unlawful.~~,~~ ~~and i~~It ~~would also~~ follows – if that is correct –that the power of detention could not be exercised again in the future.

The present exercise of the powers

It is appropriate to point out that there is no suggestion that the correct power of detention had not been used in all these cases since 9 January 1997 when they were detained pending a determination of a request for refugee status. Secondly, there is no suggestion that once the removal orders were made under s. 13 that those removal orders could not and would not be carried out expeditiously.

Hardial Singh

~~-~~It is, therefore, necessary to consider the principles relied upon by the learned judge in the case of *Hardial Singh* ~~*Hardial Singh*~~ (supra). It was a *habeas corpus* application. ~~It related to t~~The applicant ~~who~~ had entered the United Kingdom lawfully ~~and~~ with indefinite leave to remain. But he committed offences and when he was

serving his sentence of imprisonment, the Secretary of State made a deportation order upon him. When the order was served he was in open prison. He absconded. That was in January 1983. He was arrested two weeks later but in consequence of his absconding, he lost remission which~~and then~~ put his ordinary release date back. ~~It was in fact 12 August.~~ But after his sentence came~~would have come~~ to an end, he remained in detention pending the exercise of the power to deport him.

Against ~~With~~ that background, the judge held that the power to detain was ~~apparently~~ no longer valid because of the time taken to carry out the purpose~~it was taking~~. He in fact adjourned the application to give the Home Secretary the opportunity of making further submissions ~~to him~~ to explain when the order would be carried out. So far can be seen, no application to restore the case was ever made.

~~-~~On the principle, Woolf J (as he then was) said at 706D:

> "I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

I understand the principle ~~from that~~ to be that where detention is maintained for a longer period than~~t~~ is reasonable for the exercise of the power, the power ~~becomes~~ dissipate~~d~~. It can no longer be said by the jailer~~, to use a convenient word,~~ that the power to detain still exists. So, if the purpose for the detention has gone, if the detention is longer than is reasonably necessary to achieve the purpose, or if the person exercising the power fails to use reasonable expedition to achieve the purpose for which the power to detain has been exercised. In those circumstances the jailer cannot say he lawfully holds the subject.

Do the "*Hardial Singh principle*s" *apply?*

Applying the approach which the judge adopted ~~set out at the beginning of his consideration of these principles,~~ I cannot agree with his conclusion. I accept that if the Director had followed the procedure which was held by the Privy Council ~~and by others~~ to be the correct procedure, these applicants would now have been~~be~~ released and would ~~now~~ be in China or elsewhere. But, of course, it is right to note~~know~~ in passing that there ha~~s~~d been a remarkable divergence of judicial opinion on the relevant law.

T~~ as to how they should in fact have been dealt with. But t~~he focus of these proceedings must be on the return. The applicants are detained pending removal to China, that is the purpose. It is not suggested that there is any other. Is the time taken to remove them to China reasonably~~e~~ necessary to achieve that purpose, or is the period of detention under this section unreasonable?~~.~~ The contrary is~~It is~~ not suggested ~~that it is~~.

Finally, it is clear that the Director is using reasonable expedition to achieve the purpose of removing the applicants to China and, if freed of the court's interference in this matter, that purpose is likely to be achieved within weeks.

For my part, subject to some matters which I will raise, I would hold that the judge was wrong and that the detention i~~wa~~s lawful. The previous history, unfortunate as~~that~~ it is, is not relevant to the exercise of the present power. I say this because the Director of Immigration is validly exercising his power to remove under s. 13, that is the trigger. H~~h~~e ~~made and~~ detained under s. 32 to enforce his order – the so-called *Hardial Singh* principles, in my judgment, simply do not apply. The contrary would lead to a strange situation but that is not a matter of concern where the liberty of these applicants is at stake. ~~But it would involve the situation whereby t~~The Director of Immigration has the power to remove but he would not be able to exercise that power by detaining them ~~in order to do so~~ either under the present order for detention or under any future one.

Is there any other basis upon which the judge's order can be upheld?

As personal liberty is involved, the court has cast about to determine whether there is any other basis upon the judge's order could be supported. In *habeas corpus* proceedings if the power of detention is *prima facie* valid, there are very limited circumstances under which the court willmay hold it for other reasons invalid. Of course, if the power is not exercised *bona fides* that would be one reason for holding the detention unlawful. That is not suggested for a moment in this case. So itthat can be excluded.

The only possible argument, which was put forward perhaps at the invitation of the Court, was that the exercise of the power to detain after this history was an abuse of process. Encouraged by the Court, Miss Li SC very helpfully – followed by Mr Marshall, SC who also helped in this matter –, invited the Court's attention to *In the matter of the Deportation Ordinance 1917 and In the matter of Sung Man-cho v The Superintendent of Prisons* [1931] HKLR 62. The facts of the case can perhaps be left aside. I makde reference to two passages. The first in the judgment of Sir Joseph Kemp CJ when he said at p. 72:

> "There can be no doubt that but for the possible effect of section 5 of the Deportation Ordinance, the taking of the applicant into custody on the valid second deportation order was unlawful because he was then in unlawful custody."

That was echoed in the judgment of Lindsell J at p. 75:

> "There can, I think, be no doubt on the authorities, especially the Smugglers' cases, i.e. *AG v Dorkings*, *AG v Carl Cass*, & *AG v Golder*, that the original arrest of this prisoner having been illegal, detention under the warrant issued by His Excellency the Governor on June 11th, 1931 was invalid and that thereafter right up to August 12th the prisoner's detention was illegal."

We are invited to say following the decision of the Full Court and 'the *Smugglers*' cases' that, as on the assumption that the earlier detention of the applicants was illegal, that the new basis of detention after January is also illegal. following those cases. However, I am unable to accept that as a correct proposition for presentthe purposes even though this isof a *habeas corpus* applicationcase, although that was the subject of the proceedings in the Hong Kong case. The reason is this. The above propositions are not, in my view, supported by the *Smugglers*' cases. They show that indeed there had

been an abuse of process, following unlawful arrests. The reason was simple. The applicants ~~in those cases~~ had been arrested outside the jurisdiction of a particular court and in consequence of the unlawful arrest, had been brought into the jurisdiction. The purported lawful arrest was made after they had been brought unlawfully into the jurisdiction. Clearly that was a basis upon which the Court ~~w~~could find an abuse of process, but in my judgment ~~here~~, there was none on the facts of this case.

~~-~~R.J. Sharpe on the Law of *Habeas Corpus* the 2nd Edn at p. 179 says:

> "(a) *Prior Illegality*
>
> The general rule is that unless prior illegality vitiates the present cause of detention, it will not matter what has happened to the prisoner, so long as the detention is now justified. Whether past illegality does vitiate the present grounds for the detention is a question to be answered by the particular legal rules applicable to the matter in question, and not by any general principles of the law of *habeas corpus*. The principle often comes into play where the applicant has been illegally arrested. It also will usually allow the authorities to amend and correct informalities which are relied on as grounds for an application.
>
> …
>
> (ii) *Amending the Cause of the Detention.* The rule that it is only present circumstances of the restraint which are relevant has meant that the courts are always prepared to allow for a substituted warrant which corrects defect in the first committal. It will be permissible for there to be a substituted warrant even after the writ is issued and served. Indeed, it has been held that it is possible to amend the return to the writ or to supply a new and better cause for the detention as the court commences the hearing. It would seem that so long as material proffered tends to show present justification, it will be accepted by the court at any stage of the proceedings."

In my judgment, those are correct statements of the law. ~~and~~ T~~t~~hey are indicative of the nature of *habeas corpus* proceedings, perhaps in contrast to proceedings for judicial review where~~while~~ wider considerations may apply.

In my judgment, therefore, there are no other principles which are relevant. General questions of fairness or injustice in *habeas corpus* proceedings are not relevant. ~~Also, t~~The applicants are entitled to justice according to law.

For those reasons, I would hold that the judge was wrong. I would allow the appeal and set aside his order.

The 7th applicant

That leaves the last applicant.

He came to Hong Kong in May 1996. He came from China and was, he says, treated as an illegal immigrant. although Tthere was some dispute about that but i. It perhaps matters not. There is no dispute now – and there was not below – that he is an ECVII but he was not accorded the treatment under Part IIIA of the Immigration Ordinance. On arrival an order was made under s. 11(1) of the Ordinance refusing him permission to land in Hong Kong. That was followed by an order for his removal. The judge set out the history of this. He said:

> "… 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 [his] detention under section 32(3A) pending his removal from Hong Kong."

It is under the latter section which the Director says he is holding him validly now.

The judge held that this applicant's detention was unlawful because he was entitled to have his request dealt with under Part IIIA of the Ordinance and that no order for his removal could be made before it was considered. The basis of his decision was this:

> "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."

In my judgment, in *habeas corpus* proceedings, those considerations are not engaged. The Director of Immigration refused the applicant's permission to land under s. 11(1), having done so he had the power to order his removal and then to detain him, pending his removal. There is no suggestion in this case that that is not being carried out *bona fide* or there has been any unreasonable delay in carrying out that purpose. In my judgment, the fact that the Director of Immigration could have exercised his powers under Part IIIA is nothing to the point. He did not do so. It is not necessary to consider,

in my judgment, in *habeas corpus* whether he could have exercised his powers under Part III~~s. 3~~A of the Ordinance.

~~-~~In my judgment, that~~it~~ concludes this particular point. So far as the judge's decision that the Privy Council found that a person in his position was entitled to be treated under Part IIIA, I am bound to say that I do not read the Privy Council's decision as leading to that result. It was not an issue~~a matter~~ in which the Privy Council was directly engaged. Section 13A reads:

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

~~Of~~Those clear terms~~, that would~~ appear to give the immigration officer a discretion in the matter. We are not concerned with an issue whether the discretion could have been exercised differently. ~~That is not engaged in this case.~~ If at any time that is raised~~it is engaged~~, it will probably ~~have to~~ be considered~~engaged~~ in judicial review proceedings.

~~-~~For my part, ~~however,~~ I would hold~~,~~ – ~~and~~ this is a matter that has been the subject of submissions ~~–~~, that those clear words do give the immigration officer a discretion in this matter and that the word "may" does not mean "must". Although, of course, the discretion which he exercises must be very limited when he is dealing with a person previously a resident in Vietnam. The sort of case where he may~~de~~ feel~~s~~ it necessary to exercise his discretion in the way he did is in the case of a person who has come from Vietnam to China and then to Hong Kong recently as this applicant did. But that is not a matter upon which I, for my part, would express any view ~~make any decision~~. My decision is that this applicant is lawfully held. I would allow the~~his~~ appeal in his case.

In those circumstances, for my part, I would allow the appeal.

Godfrey, J.A. :

These are habeas corpus proceedings. As the judge below recognised, the only question he had to decide was whether the current detention of the applicants was lawful. He decided that it was not.

The judge founded himself on the decision of Woolf, J. in *R. v. The Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704. This establishes that a power of detention is to be limited to a period which is reasonably necessary to achieve the purpose for which the power was granted; and that the person on whom the power is conferred must take all reasonable steps to ensure that that purpose is achieved within a reasonable time.

But, in my judgment, none of this is relevant, on the facts of the present case, to the question which the judge had to decide.

The applicants are currently detained under powers the purpose of the exercise of which is to enable the Director of Immigration ("the Director") to remove the applicants to the mainland. The only impediment in the way of this is the applicants' refusal to go back there.

It is said, for the applicants, that their current detention is unlawful under the *Hardial Singh* principles (or, at any rate, a legitimate extension of those principles) because of the history of the matter preceding the Director's exercise of the powers under which the applicants are currently detained. That is a long, and unfortunate, history, which would have ended long ago if the Director had considered the applicants' requests for permission to remain here as refugees when they ought to have been considered.

Despite the concession which, the judge recorded, had been made below as the applicability of these principles, I am, for my part, unable to see how these principles have any application on the facts of the instant case.

The judge, say the applicants, decided that their detention had been unduly and unjustifiably prolonged by the Director; so, say the applicants, the current decision is, on *Hardial Singh* principles, unlawful.

A reasonable time for their removal, say the applicants, must be reckoned from the date of the *original* decision to detain them, not from the date of the exercise of the power under which they are currently detained.

I regret that I am unable to accept this argument. It fails to focus on the only question in issue; the legality of the exercise of the power under which the applicants are *currently* detained. It brings into the consideration of that matter factors which, as it seems to me, are wholly extraneous to the resolution of the question. It involves, in my judgment, an illegitimate extension of the *Hardial Singh* principles, for which that case itself provides no warrant.

Are there, then, any *other* possible objections to the legality of the exercise of the powers under which the applicants are currently detained?

Two other possible objections were canvassed in argument before us.

First, can it not be said that, in all the circumstances, the decision of the Director to exercise the power under which the applicants are currently detained was unreasonable, unjust, or unfair? The answer to that is that it may be so; but that it is not a matter for consideration on the question of the sufficiency of a return to a writ of habeas corpus. If there is anything in the point, it must be raised in proceedings for a judicial review of the Director's decision : cp. *Ullah v. Home Secretary* [1995] Imm. AR 166.

Secondly, can it not be said that it was an abuse of the power to authorise the detention of the applicants for the Director to exercise it when, at the date of the exercise, the applicants were already detained in circumstances which, under the *Hardial Singh* principles, could no longer justify the detention? The answer to that is simply that those circumstances do not warrant the characterisation of the Director's current exercise of the power to authorise the applicants' detention as an abuse of that power. I accept that there may be cases in which the exercise of a power to detain, on the face of it lawful, is vitiated because, but for some wrongdoing on the part of the person authorising the detention, the power could not have been exercised at all; see, e.g. *Hooper v. Lane* (1857) 6 HLC 442. But that is not what happened here. The prolongation of the original detention of these applicants was, to say the least, unfortunate; but I do not see how it can be held to have constituted an abuse of the power under which the applicants are currently detained for the Director subsequently

to have authorised the applicants' present detention pending their removal to the mainland.

For these reasons, I agree that we must allow this appeal.

Rogers, J.A. :

I too agree that the Appeal in respect of the Applicants, termed by the Judge below as being in category (i), reluctantly, has to be allowed. I wish to say just a few words since not only are we differing from the Judge below, but the result of this Decision will mean the deprivation of the liberty of the Applicants who have been deprived of their liberty for a long time.

The short reason is that on this application the Court looks at the validity of the present detention. The detention, at present, is put on the basis that the Applicants are detained pending their removal from Hong Kong. It is to that the Court must look. Ms. Gladys Li, S.C. in her argument for the respondents to this Appeal stresses the fact that the judgment below proceeds on the basis that the principles in *R. v. Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704 have to be extended. That case turned upon the basis that there was an explicit limitation in the exercise of a power of detention that it should only be for a period reasonably necessary for the purpose.

The purpose in the present instance is pending deportation to China. At the time the application was launched, many of the Applicants were still awaiting determination of their cases. They fell within what was termed category (ii) in the Judgment.

The Judge below considered that because of the delays which had resulted in the Applicants being in detention, since in some cases the late 1980's, the case should be looked at on the footing that had the cases been properly dealt with the Applicants would have either been returned to China or released by then. That is undoubtedly correct. Nevertheless it was the present detention and the reason for it which must be

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

I would add, however, that in view of the Appellants' contentions that the original detentions were not flawed, it seems to me that, had the decisions not been made by the time of the hearing, the Appellants might well have been in difficulties in maintaining that the detentions were for a period reasonably necessary for the purpose of determination of whether to grant or refuse permission to remain in Hong Kong.

I turn then to the case in respect of Applicants A114, A117 and A118. In respect of those cases I consider that the learned Judge below was correct. The returns in those cases read as follows :

> "DIEP MINH QUANG, VRD 67/6/96, is detained in my custody under and by virtue of an order of Director of Immigration transmitted to the Commissioner of Correctional Services by a memo dated 11 July 1996 a copy of which is attached hereto."

There then follows a copy of the memo the material parts of which read :

> "Please continue to detain the following 16 ECVIIs of [reference] under S. 32(3A) of the Immigration Ordinance …..
>
> 6. VRD 67/6/96 DIEP MINH QUANG"

There then follows M. 1 which reads :

> " This is a case for consideration of issue/non-issue of removal order, and/or strong or powerful humanitarian grounds or other circumstances which would justify remaining in Hong Kong. The case file is attached for your perusal. I am satisfied that this person does not :-
>
> (i) enjoy the right of abode in Hong Kong; or
>
> (ii) have the right to land in Hong Kong; or
>
> (iii) have permission to remain in Hong Kong.
>
> 2. The person concerned is DIEP MINH QUANG, VRD 67/6/96.
>
> I believe that the person entered Hong Kong on or about 8 May 1996 from China.
>
> 3. I am of the view that there are no known powerful or strong humanitarian grounds or other exceptional circumstances which could justify recommendation for remaining in Hong Kong.

> 4. I recommend this person's removal under Section 19(1)(b) and detention pending removal under Section 32(3A) of the Immigration Ordinance. I further recommend that this person be removed to China under Section 25(4) and Section 25(2)."

There then follows M.2 signed by the Deputy Director of Immigration.

> "I have considered the circumstances in respect of the one person named above and hereby order the removal of the person under Section 19(1)(b) of the Immigration Ordinance. I have signed the removal order in respect of this person and I also authorise his detention under Section 32(3A) pending removal. I further direct that this person be removed to China."

The material part of the Judge's judgment is as follows :

> "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 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)."

The issue is whether the procedures of part IIIA should have been put into force. In the case of *Nguyen Tuan Cuong v. Director of Immigration* in the Privy Council [1997] 1 W.L.R. 68, there was a powerful dissenting Opinion of Lord Goff of Chieveley and Lord Hoffmann but they did not carry the support of the majority. The minority held that it was open to the Director to make orders for removal on grounds which had nothing to do with whether or not the persons (persons who had been in China) had the status of refugees from Vietnam. The majority however had this to say at p.75 E of the report :

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

Pausing there for a moment, it is abundantly plain from the memo to which I have already referred that it was known to the Director of Immigration that this applicant had been a previous resident of Vietnam and that is why he was classified in the memo of 11th July 1996 as an "ECVII". It is also a clear inference from that memo and the one that followed that the Applicant had not been asked whether he was

claiming to be a refugee, but most certainly there was no determination on any such claim.

The opinion of a majority in the Privy Council then goes on :

> "Clearly they were and equally, in the light of the administrative decisions which the director had taken, his decision on such a request would have been to refuse it.
>
> Indeed, in substance this is what has already occurred. By electing to be placed in a detention centre after the playing to them of the recorded message, the applicants implicitly sought permission under section 13A(1) of the Ordinance to remain in Hong Kong as refugees pending resettlement elsewhere. No other provision of the Ordinance provides for such permission, and the recorded message, however discouraging, clearly held out some hope of it. By the formal refusal notices, if not earlier, permission was equally clearly refused. *Thereupon it became the duty of the director under section 13D(3) to cause to be served notices of the right to apply for review. 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.*" (my emphasis added).

None of that, of course, ever happened.

In my view, the learned Judge was correct. The process was flawed and the writ of habeas corpus should lie.

I would like to add a word about the documents in this case. There are some 10 box files of documents totalling over 3,300 pages. These have been meticulously copied. They have been put into the files with coloured dividers in a manner that would be a model of perfection in other cases. Apart from the bundles for the Court there were doubtless at least two, if not three, bundles for each of the parties. This makes a total of something in the order of 25 to 30,000 pages and no doubt hours of labour. The case was opened on the basis it was a pure point of law. In the course of argument I noted reference to the Judgment and the Notices of Appeal and about 3 pages. The skeleton arguments refer to a few more. Whilst fully appreciative that to limit the documentation to be provided also requires considerable concentration and effort at a time when it may well be inconvenient to turn attention to the preparation of the case, it has to be said that the result is a waste of time and effort, it distracts from the consideration of the papers and thus slows the process, not to say damages the environment. For my part, I would not allow the costs of preparation of more than two box files of documents.

Mortimer V-P:

In each case the appeal is allowed and the orders of the judge are set aside.

[Submissions of Counsel on Costs]

Mortimer V-P:

We think in the circumstances no order for costs is the appropriate order.

(Barry Mortimer)	(G.M. Godfrey)	(Anthony Rogers)
Vice President	Justice of Appeal	Justice of Appeal

Miss Gladys Li SC and Mr Hectar Pun (M/s Pam Baker & Co) for Applicants
Mr W.R. Marshall SC and Miss Joyce Chan (Dept of Justice) for 1st and 2nd Respondents