HCAL80/97

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ADMINISTRATIVE LAW LIST NO. 80 OF 1997

BETWEEN

TRAN THANG LAM
AND OTHERS — Applicants

and

THE DIRECTOR OF IMMIGRATION — Respondent

Before : Stock J in Court

Dates of hearing : 20th-22nd, 24th, 27th-29th July, 1998

Date of handing down judgment : 25th September, 1998

Judgment Index

I.	Background	Page 2
II.	The Decisions and The Issues	Page 7
III.	Legislation and International Instruments	Page 15
IV.	Issues of Legality	Page 25
V.	Issues about Procedure	Page 60
VI.	Conclusions	Page 86

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J U D G M E N T

This is an application for judicial review of decisions by the Director of Immigration in relation to 116 former residents of Vietnam who came to Hong Kong after they and their families had lived for some years in Mainland China.

In the course of 1997, the Director of Immigration classified each one as a 'refugee from Vietnam in China', permitted them to remain in Hong Kong as such, but then immediately ordered the removal of each to the Mainland. The applicants do not complain about the decision to classify them as refugees and to allow them to remain in Hong Kong, but they do complain about the decision to order their removal from Hong Kong. They say that the removal orders were unlawful.

I. BACKGROUND

History

There is a long history to this case, and this particular challenge is not the first which these applicants have amounted before the courts.

The applicants are all former residents of Vietnam. The youngest is now aged 19 and the oldest 63 years. The great majority were born in the 1960s and 1970s. They and their families in Hong Kong directly affected by this application number 258. They are all ethnic Chinese. During the late 1970s and the early 1980s — in the main between 1978 and 1980 — they all left Vietnam, at a time of hostility between Vietnam and the People's Republic of China ('PRC'). They were compelled to leave or felt themselves so compelled by circumstances in that country directly connected with prevailing attitudes to ethnic Chinese in Vietnam. When they left Vietnam, they all went to Mainland China ('the Mainland').

There they lived for some years before eventually they travelled to Hong Kong and sought to gain entry here. Almost all the applicants came by boat in 1993; although a couple came in 1989 and a handful in 1990 and 1991. It should be noted that before they came to Hong Kong none had lived on the Mainland for less than a decade: most of them had lived there for 13, 14 or 15 years before they came here. Their hope was that once in Hong Kong they would be permitted to remain here as Vietnam refugees pending resettlement elsewhere, though certainly not Mainland China.

Upon arrival in Hong Kong, a tape was played to them which said that illegal immigrants were not welcome here, but that if they chose to remain they would be screened to see whether they had refugee status, and that if they were not refugees they would promptly be repatriated to Vietnam. The alternative was that after reprovisioning they could leave Hong Kong waters in their boats. They chose to stay for rescreening. They claimed that in China

they were never settled or accepted, nor were they accorded the rights that ought to be accorded to refugees. They had, they said, been denied the same rights as Chinese nationals, such as the right to work and education and registration; and they said that there was a risk of them being forced back to Vietnam; so that they remained refugees without full protection in a third country.

But in the event they were not screened for refugee status. The view was taken that the screening procedures then in place for refugees from Vietnam were not intended for those who had fled Vietnam but had spent many years living in another country before coming to Hong Kong. They were classified by the authorities here as "Ex China Vietnamese Illegal Immigrants" ("ECVIIs") — an administrative classification — and under the provisions of section 11 of the *Immigration Ordinance* ("the *Ordinance*"), refused permission to land.

They were then ordered to be detained pursuant to powers conferred by section 18 of the *Ordinance*, pending their removal from Hong Kong. However, a person detained under section 18 had to be removed from Hong Kong within two months of the making of the removal order, although to that requirement there was an exception, that if he was a former resident of Vietnam, that time limit did not apply. The statutory provision permitting that exception in relation to former Vietnam residents lapsed in 1993. Since it was the intention of the Director to remove the applicants to the Mainland and because that was a complicated exercise which was going to take more than two months in any one case, he used the provisions of section 13D of the *Ordinance* which permits detention — without a specific time limit — of any resident or former resident of Vietnam after a decision to refuse him permission to remain in Hong Kong and pending his removal from Hong Kong.

However, section 13D(3) required that where a person was detained after refusal of permission to remain under Part IIIA of the *Ordinance*, the Director was obliged to serve upon him a notice which explained his right

to apply to the Refugee Status Review Board ("RSRB") for a review of the decision that he may not remain in Hong Kong as a refugee. The Director did not serve such a notice on any of the applicants. He proposed to remove the applicants w they were not entitled to such screening.

Arrangements were then made for the ECVIIs to be returned to the Mainland. The present applicants were not the only ECVIIs in Hong Kong. At one stage, Mainland authorities wanted to verify the particulars before accepting ECVIIs back. Those verified were returned. Others, including the present applicants were then interviewed here by Mainland officials in late 1994. In March 1995, the Mainland agreed to take even the unverified ones back. In June 1995, some of those were returned. A number of the applicants — 16 in all — were in fact returned to the Mainland but have since 'double backed' to Hong Kong. Most of the present applicants had not been removed to the Mainland by the time judicial review proceedings were launched; proceedings that eventually found their way to the Privy Council.

The First Judicial Review

In July 1995, the applicants were granted leave to apply for judicial review. A number of decisions were challenged in those proceedings, particularly the refusal to make a determination of their claim for refugee status. They failed at first instance, as well as in the Court of Appeal. Those courts were united in the view that, on the facts of the case, the applicants had been denied permission to remain as refugees under section 13A of the *Ordinance* — the section which makes provision for the admission into Hong Kong of those previously resident in Vietnam either pending determination of their claim for refugee status or as refugees pending their resettlement elsewhere. Since that was the case, and since they had been detained under section 13D, it followed as a matter of construction that they were entitled to have their cases reconsidered by the RSRB. That avenue had been denied them, so *prima facie* they were then entitled to relief, but the relief was refused as a matter of discretion.

The case, entitled **Nguyen Tuan Cuong and Others v. Director of Immigration and Others** went on appeal to the Privy Council. The appeal was, by a majority, allowed. (The Privy Council's judgment is reported at [1997]1 WLR 68). The decision of the majority turned, in the event, upon the question of the exercise of the court's discretion. They agreed that the facts were such that the applicants had sought permission under section 13A to remain as refugees in Hong Kong pending resettlement elsewhere; that permission had been refused and that there had been therefore a duty to serve them with notices about their rights of review. On the question of discretion, their Lordships took the view that it was not inevitable that the applicants would all be sent back to China, and :

> "…. that it was at least possible that if these applicants obtained 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." (page 77)

The minority (Lord Goff and Lord Hoffman) dissented, not on the matter of discretion, but on the construction of the *Ordinance*, and in particular of section 13D(3) — the section which required service of a Board notice. They were of the opinion that the power to detain former residents of Vietnam pending removal was not restricted to those who had been refused permission to remain here on the grounds that they did not have refugee status; but extended to those who were refused such permission on grounds :

> "….. which had nothing to do with whether or not they had the status of refugees from Vietnam." (page 82),

so that removal could be effected under section 13D(1) even if the decision to refuse them permission to land or remain had been taken under some section which had nothing to do with Vietnamese migrants, but rather was directed at the case of ordinary illegal immigrants. The history behind, and wording of,

section 13D(3) showed that the requirement to issue a notice was only directed at those who had been refused permission under section 13A.

The Order

Still, by reason of the view of the majority, the appeal was allowed, and an order was made in the terms set out in the minority judgment in the Court of Appeal. That order was as follows :

> "an order of mandamus requiring the Director of Immigration to consider the applicant's claim to remain in HK 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 HK as a refugee, and if adverse, to serve or cause to be served a notice on the applicants in accordance with section 13D(3)."

The Advice of the Privy Council was handed down on 21st November 1996.

Screening

The Director then embarked upon the procedure required by that order, namely, the consideration of each applicant's "claim to remain in Hong Kong as a refugee". This was to be a complex exercise, not least because the factual situation was so different from that with which the mass of earlier Vietnamese refugee cases had been concerned.

The Director obtained legal advice about the ramifications of the Privy Council decision and then set about the exercise. Since the applicants had been detained "pending removal", the Director, or rather her authorised delegate, Mr P.T. Choy, Assistant Director of Immigration, authorised their detention instead under section 13D(1) of the *Ordinance* "pending a decision". That was done on 9th January 1997. Then, immigration officers were given instructions about the case, including details of those aspects of such considerations as the Director considered would be appropriate to the decision

making process; interview questionnaires were drawn; and the applicants were interviewed.

II. The DECISIONS and The ISSUES

The Notices of Determination

In due course Mr Choy, on behalf of the Director, made a decision; or, rather, he made two decisions. They were the same in the case of each applicant. Each was served with a notice of determination. These notices were served on various dates between June and October 1997, the terms of which were the same in each case. The document is vital to the determination of this case. This is what it says :

> " You have been examined by an Immigration Officer to determine whether you should be permitted to remain in Hong Kong as a refugee/refugees pending resettlement elsewhere. Having taken account of all the matters you have put forward in support of your claim, the Director is satisfied that you are a refugee/refugees from Vietnam in China who have been detained under Part IIIA and therefore permits you to remain in Hong Kong as a refugee/refugees under section 13A(1) of the Immigration Ordinance Cap. 115.
>
> After examination by the Immigration Officer the Director also finds that :-
>
> (a) you were granted a durable solution and protection in China in terms of Paragraph (e) of Conclusion 58 of the Executive Committee of the High Commissioner's Programme;
>
> (b) you have moved in an irregular manner from China to Hong Kong;
>
> (c) China will accept you back to China and will protect you there against refoulement to Vietnam and will treat you in accordance with basic human standards as required by Paragraph (f) of the said Conclusion 58; and
>
> (d) In terms of the judgment of the majority of the Privy Council in Nguyen Tuan Cuong and others you have lost entitlement to consideration in Hong Kong for resettlement overseas other than in China by return to China.
>
> In consequence of the above findings the Director has ordered your removal to China under S.13E of the Immigration Ordinance and your detention pending that removal under S.32(1)(a) of the Immigration Ordinance."

So whilst each applicant was told that he or she was permitted to remain as a refugee from Vietnam in China, that news was scant comfort, because conveyed by the same letter was the other news that he or she was to be detained and removed to China.

Once again, no notice was served on any of the applicants under section 13D(3) suggesting a right of review by the RSRB. The Director took the view that, as a matter of law, no review was available to the applicants. They had been permitted to remain under section 13A(1) of the O*rdinance* as refugees pending resettlement, and since the requirement to serve a section 13D(3) notice only arises upon a refusal of permission to remain, there was no place for the service of a notice. And because no notice was served, the right to apply for a review under section 13F was not engaged.

It is common ground that there is no right to appeal against, or right to seek a review of, a removal order under section 13E.

The decision to permit the applicants to remain in Hong Kong as refugees is not challenged in these proceedings. What is challenged is the legality of the decision to make the removal orders under section 13E.

To complete the picture, I should mention allied proceedings, which do not bear upon any matter of law which I am required to decide. After their detention following the removal order, the applicants applied for the issue of a writ of habeas corpus, challenging the legality of their detention, and the basis of that action was the length of time they had been held. They were successful at first instance, unsuccessful when that decision went before the Court of Appeal, and unsuccessful again upon the recent determination of the Court of Final Appeal (FACV No.2 of 1998). It follows that return to detention would be lawful, but they are not in fact in detention, for the Director has given an undertaking that she would not seek to re-detain them until after the delivery of judgment in this application.

These Proceedings

Leave to apply for judicial review was granted by Keith J on 15th September 1997, and there were before him subsequent interlocutory applications which need not concern us, save that leave was given on a number of occasions for amendments to be made to the application.

The decisions in respect of which relief is sought are the decisions to order removal to the Mainland of all the applicants, and the decisions to detain the applicants pending their removal to the Mainland. The applicants seek orders of certiorari to quash the Director's decisions. There is also an application which relates to a decision of the Secretary for Security contained in a letter dated 27th June 1997 that the applicants who have Vietnamese spouses and who have not lived on the Mainland might be removed to the Mainland without their children, and that those spouses and children might be removed to Vietnam. I am told that that decision is not to be implemented, and that I am now not asked to make a determination about it.

Burgeoning Grounds

The grounds framed in the notice of application have, as a result of amendments made since they were first filed in August 1997, burgeoned, and the volume of evidence filed by the applicants and the respondent grown exponentially, so that by the time this matter first came before me earlier this year on an interlocutory application, I was presented with something in excess of 4,000 pages of evidence. I pause to comment that there must be very few judicial review applications indeed which could possibly justify that amount of evidence, and it was not justified in this case. It is unnecessary and wasteful to add such a burden to the court's task. There is also a duty on those acting for parties in such cases to denude affidavits of detailed legal submissions — and there have been reams of that from the respondent — and to keep them to the bare factual minimum truly required. The relevance of

this piece of procedural history is not merely to intimate disapproval, but to set the scene for the dismantling of the issues which I have sought to effect.

The grounds, as they developed in the ever expanding application, contained a significant number of complaints. At first, and putting the matter very broadly, they were :

(1) That the decision to send the applicants back to the Mainland did not constitute an offer of resettlement.

(2) It was not lawful for the Director to make an order under section 13E unless an offer of resettlement had first been made but then unreasonably rejected.

(3) That the evidence placed before the Director demonstrated that on the Mainland the applicants had not been accorded minimum rights to which refugees are entitled under the Convention and Protocol relating to the Status of Refugees, and there was no material upon which the Director could conclude that it was consistent with the Convention and with the *Ordinance* to return the applicants to the Mainland.

(4) That each of the reasons for the Director's decisions as articulated in the Notices of Determination is flawed, so that she had taken into consideration irrelevant matters. It was said that Conclusion 58 was not relevant. The *Ordinance* contemplates relocation of refugees where they will be resettled according to Convention standards, and not relocation to a place where they will be afforded merely basic measures of protection; a standard, in other words, lower than that contemplated by Convention obligations. The *Ordinance*'s requirements which are self evidently part of domestic law must prevail over the guidelines of Conclusion 58, which is not.

(5) That the Director had misconstrued the effect of the Privy Council's decision, and in doing so had wrongly fettered her discretion, in particular by shutting her mind to resettlement of any of the refugees to countries other than China.

(6) That that if Conclusion 58 was relevant the Director had misconstrued the effect of Conclusion 58 in that she read it

as requiring a lesser measure of protection than that conferred by the Convention, whereas it can only properly be read and implemented as being consistent with the level envisaged by the Convention. In other words, 'basic human standards' can only mean the minimum rights specified by the Convention. In any event, there was no evidence on which the Director could conclude that Conclusion 58 applied to the applicants, or that the applicants had been provided with a durable solution, or that they had been provided with asylum as refugees.

(7) That since the evidence was that the applicants were denied minimum Convention rights on the Mainland, the criteria required by Conclusion 58, on any construction, were not satisfied, and that the applicants had a reasonable excuse to refuse an offer of re-entry to the Mainland.

The first tranche of amendments added complaints of procedural unfairness. Such complaints were that :

(1) Matters detrimental to their cases were not put to the applicants before an adverse decision was reached, even though they were matters upon which the Director ultimately relied when making the order under section 13E. These were matters about country conditions, and alleged inconsistencies in various statements which had been made by the applicants at various stages.

(2) Mr Choy was predisposed to disbelieve the applicants, and that in the circumstances no fair determination could be made; this primarily because it was Mr Choy who had been involved in all previous decisions relating to these applicants; it was not necessary for him to be the person designated once more; he never interviewed any of the applicants; he relied exclusively on his own understanding of country conditions; and that his predisposition is evident from the very fact that not one of the applicants was successful in his or her objective.

Then there was an application to re-re-amend the application for leave and the notice of motion; as well as an application for the discovery of

documents, and for an order for cross examination of deponents of affirmations filed on behalf of the respondent. And there was an application by the respondent that a swathe of evidence filed by the applicants be struck out. All these applications came on before me in June this year, with the hearing of the substantive application already set for July.

The application to re-re-amend was to allege bad faith on the part of the decision maker as well as to deploy further allegations of procedural impropriety. It is intended to allege :

(1) that those representing the applicants were denied the opportunity to review interview notes and prior statements in order to make submissions to the Director on behalf of the applicants before a decision was made.

(2) that records of interview and statements have been re-written by immigration officers without the knowledge of the applicants, and there are allegations of abusive conduct by some interviewing officers.

(3) that the procedure adopted was a deliberate ploy by which the applicants were deprived of the opportunity to canvass their case before any review or appellate forum.

(4) that the decisions made by Mr Choy were made in effect at the direction of the interviewing officers; and that reasons now given by him for his decisions were not on his mind when he made his decisions, but are in fact an *ex post facto* rationalisation.

The respondent's interlocutory application, filed on a few days notice, was for the striking out of 16 affirmations as being irrelevant.

It was evident that if these various interlocutory applications were to be properly determined, they would require lengthy submissions, and the examination of voluminous evidence. This did not strike me as the most efficient or cost effective way forward. There were a number of issues, central to the case, which could be argued and determined without recourse to

three quarters of the documents that had been spawned, and which might or might not dispose of the proceedings as a whole. If they did not dispose of the entire proceedings, then at least the resolution of the outstanding applications to amend and strike out would lend themselves to easier resolution, and a double rehearsal of the full background and facts avoided.

The Five Questions

I therefore ordered that the interlocutory applications be adjourned *sine die*, and that the hearing of the substantive application set down for July 1998 be restricted to a trial of the following issues and such other or allied issues as the court might at the substantive hearing permit to be canvassed :

> "1. If a person is classified as a 'refugee from Vietnam in China' by the [Director ('DOI')] when making a decision under *s.13A1)(a) Immigration Ordinance, Cap. 115* what are the legal consequences of that decision? In particular:
>
> 1) Is the DOI bound to permit that person to remain in Hong Kong pending resettlement elsewhere? What does 'pending resettlement elsewhere' mean? Does it mean providing that person an opportunity to seek resettlement in a third country?
>
> 2) May the DOI, as in this case, immediately after granting such a person permission to remain in Hong Kong under *s.13A(1)(a) Immigration Ordinance, Cap. 115* make a removal order in respect of such a person?
>
> 2. Are any of the reasons given by the DOI for making the removal orders under *s.13E(1) Immigration Ordinance, Cap. 115* bad as taking into account irrelevant considerations, or failing to take into account relevant considerations, or resulting from a misconstruction of law or of documents relied upon? In particular:
>
> 1) Has the DOI misconstrued the meaning, effect and application of Conclusion 58?
>
> 2) Has the DOI failed to apply the Convention when it, or parts of it, should have been applied?
>
> 3) Has the DOI misconstrued or misapplied the effect of the Privy Council decision? If not, has the DOI, when applying it ignored relevant provisions of the *Immigration Ordinance, Cap. 115*.

3. Was the DOI — whether through Mr Choy or immigration officers — required to put to the applicants country condition evidence or conclusions about country conditions before making a final determination about their status and what should happen to them?

4. Was the DOI — whether by Mr Choy or through immigration officers — required to provide the Applicants with copies of previous statements made by them (whether made upon arrival or later) which were used in the decision making process by the Director so as to enable the applicants to comment upon them, or to make such corrections as they proposed?

5. Was the DOI obliged to notify the Applicants of her proposed decision to make removal orders under *section 13E(1) Immigration Ordinance, Cap. 115* and state the grounds, and provide documents relied upon, for making that decision so as to provide the Applicants with an opportunity to make representations against the making of the order?"

The issues were framed in consultation with counsel.

III. LEGISLATION and INTERNATIONAL INSTRUMENTS

The *Ordinance*

Section 4 empowers an immigration officer or an immigration assistant to examine any person on his arrival in Hong Kong, "or if he has reasonable cause for believing that such person landed in Hong Kong unlawfully, at any time". There is also a power conferred by that section to examine a person if the officer has reasonable cause to believe that a person is contravening a condition of stay.

Section 11 — upon examination under section 4, permission to land or remain may be given and an immigration officer may, on the other hand, refuse a person permission to land. Where permission to land or remain is given the immigration officer or an immigration assistant may impose a limit, and other conditions, of stay. Such conditions may by notice in writing be cancelled or varied. For the purposes of the *Ordinance*, references to Director includes the Deputy Director, any assistant director and any member of the Immigration Service of the rank of senior principal immigration officer.

Section 13 enables the Director to authorise any person who has landed unlawfully to remain in Hong Kong subject to such conditions of stay as he deems fit.

Section 19 gives power to the Director to make a removal order requiring a person to leave Hong Kong. The circumstances in which the Director may exercise that power are limited. They include the power to remove a person who has landed unlawfully or 'is contravening or has contravened a condition of stay'.

The regime for the treatment of residents or former residents of Vietnam is covered by Part IIIA of the *Ordinance*. The following provisions are central to this case :

Section 13A :

> " (1) An immigration officer or a chief immigration assistant may permit any person—
>
> (a) who was previously resident in Vietnam and who has been examined under section 4(1)(a); or
>
> (b) who was born before 31 December 1982 and whose father or mother was previously resident in Vietnam and who has been examined under section 4(1)(b),
>
> to remain in Hong Kong as a refugee pending his resettlement elsewhere.
>
> (2) An immigrating officer or a chief immigration assistant may at any time by notice in writing to a Vietnamese refugee impose any condition of stay or any further condition of stay which may include—
>
> (a) a limit of stay;
>
> (b) a condition that such person shall reside in a refugee centre specified by an immigration officer or a chief immigration assistant and shall comply with any rules made under section 13C;
>
> (c) a condition that such person shall not—
>
> (i) take any employment, whether paid or unpaid;
>
> (ii) establish or join in any business; or

(iii) become a student at a school, university or other educational institution.

(3) Every Vietnamese refugee who has been permitted to remain in Hong Kong whether before or after the commencement of the Immigration (Amendment) Ordinance 1981 (35 of 1981) shall be subject to a condition of stay that—

(a) if he is made an offer of resettlement elsewhere he shall not without reasonable excuse fail or refuse—

(i) to accept the offer; nor

(ii) to comply with any requirement necessary for the completion of the resettlement procedure;

(b) …..

(4) An immigration officer or a chief immigration assistant may at any time by notice in writing to a Vietnamese refugee—

(a) cancel any condition of stay in force in respect of such person;

(b) vary any condition of stay (other than a limit of stay) in force in respect of such person;

(c) vary any limit of stay in force in respect of such person by curtailing or enlarging the period during which such person may remain in Hong Kong.

(4A) Any Vietnamese refugee who remains in Hong Kong without the permission of an immigration officer or a chief immigration assistant beyond the period allowed by any limit of stay specified in any condition of stay in force in respect of him shall be deemed for the purposes of this Ordinance to have landed in Hong Kong unlawfully upon the expiration of such period."

"Vietnamese refugee" is defined by section 2 as a person who —

"(a) was previously resident in Vietnam; or

(aa) was born after 31 December 1982 and whose father or mother was previously resident in Vietnam; and

(b) is permitted to remain in Hong Kong as a refugee pending his resettlement elsewhere;"

Section 13D :

" (1) As from 2 July 1982 any resident or former resident of Vietnam who—

(a) arrives in Hong Kong not holding a travel document which bears an unexpired visa issued by or on behalf of the Director; and

(b) has not been granted an exemption under section 61(2),

may whether or not he has requested permission to remain in Hong Kong, be detained under the authority of the Director in such detention centre as an immigration officer may specify pending a decision to grant or refuse him permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong, and any child of such a person, whether or not he was born in Hong Kong and whether or not he has requested permission to remain in Hong Kong, may also be so detained, unless that child holds a travel document with such a visa or has been granted an exemption under section 61(2).

…...

(2) Every person detained under this section shall be permitted all reasonable facilities to enable him to obtain any authorization required for entry to another state or territory or, whether or not he has obtained such authorization, to leave Hong Kong.

(3) Where a person is detained under subsection (1) after a decision under section 13A(1) to refuse him permission to remain in Hong Kong as a refugee, such person as the Director may authorize for the purpose shall serve on the detained person a notice in such form as the Director may specify notifying him of his right to apply for a review under section 13F(1)."

Section 13F relates to reviews by the RSRB. The subsections relevant to this application are these :

" (1) Any person on whom a notice is served under section 13D(3) may ….. apply to the Board to have the decision that he may not remain in Hong Kong as a refugee reviewed.

…….

(5) Upon the hearing of the review a Board shall make such decision as to the status of the appellant and as to his continued detention under section 13D(1) as it may think fit, being a decision which the Director might lawfully have made under this Ordinance, and the Director shall give effect to such decision.

(6) For the removal of doubt it is hereby declared that the making of an application under this section does not give the person by whom or on whose behalf it is made the right to land or remain in Hong Kong pending the decision of a Board on the application."

Section 32 makes provision for detention pending removal; and that applies to a removal order under section 19, as well as to an order, as in this case, under section 13E.

Section 53 plays some part in the arguments advanced in this case. It provides that :

> " (1) Subject to subsection (8) any person aggrieved by a decision act or omission of any public officer taken, done or made in the exercise or performance of any powers, functions or duties under this Ordinance may by notice in writing lodged with the Chief Secretary object to that decision, act or omission;
>
> ...
>
> (3) Any objection under subsection (1) shall be considered ... by the [Chief Executive] in Council."

Subsection (5) entitles the Chief Executive in Council to reverse or vary the decision reviewed; and subsection (7) declares that the lodging of an objection does not give the objector the right to remain in Hong Kong pending the decision of the Chief Executive in Council.

Subsection (8), however, excludes the right of objection in certain circumstances :

> " No objection shall be made under this section –
>
> ...
>
> (b) to a removal order made by the Director;
>
> ...
>
> (e) to any decision in respect of which a right to apply to a Board under section 13F(1) has at any time subsisted; or
>
> (f) to an order for the removal of a person from Hong Kong under section 13E; ..."

'Removal order' under section 53(8)(b) means one made under section 19 of the *Ordinance*.

Section 53A gives rights of appeal, on limited grounds, to the Immigration Tribunal from removal orders made under section 19. The

grounds are either that the affected person has the right of abode in Hong Kong; or that at the date when the removal order was made he had the permission of the Director to remain in Hong Kong, and in such a case the appellant may not be removed until the determination of his appeal. If it be shown that he did indeed have the permission of the Director to remain at the date of the removal order, then the Tribunal is bound to allow the appeal.

International instruments and the development of allied local legislation

The United Nations Convention relating to the Status of Refugees was adopted by the United Nations in 1951. It includes a definition of 'refugees', makes provision for the treatment of refugees, and in particular requires adherence to the principle of non-refoulement, by which is meant that no state party shall return a refugee against his will to the country where he or she fears persecution.

To cater for the emergence of new refugee situations, there emerged a Protocol relating to the Status of Refugees which entered into force in 1967.

The United Kingdom is a party to the Convention, and to the Protocol. The Government of the United Kingdom did not however extend their application to Hong Kong. The Government of the PRC is also a party to the Convention and to the Protocol, and after 1st July 1997 it too did not extend either to apply to Hong Kong. As a matter of agreement and practice, however, the authorities in Hong Kong have applied both, or have purported to do so.

Influxes of migrants from Vietnam into Hong Kong started in 1978, and in 1979 there was a mass influx. That was followed by an international conference in Geneva that year as a result of which Hong Kong and, upon an agreement by certain resettlement countries (the USA, the United Kingdom, Canada and Australia) to absorb refugees from Indo-China, other

South East Asian territories agreed to afford to asylum seekers first asylum without first determining whether they were or were not Convention refugees. That was when first the concept of permission to remain in Hong Kong 'as a refugee pending his resettlement'; entered the vocabulary of officialdom in Hong Kong, as evidenced by legislation which provided for the issue of refugee cards (see *Ordinance 62 of 1980*, section 2). At that stage and as a result of the international conference in Geneva, all those arriving from Vietnam were permitted to remain. There was then no question of categorising someone as a refugee and letting him in but removing others. In other words, there was then no 'screening' exercise.

In 1981, legislation was enacted to cater for the detention of the large numbers who had arrived and were arriving. That is when section 13A first appeared; not quite in the form as it now is, but with the provision that "An immigration officer may permit any person who was previously resident in Vietnam and who has been examined under s. 4(1)(a) to remain in Hong Kong as a refugee pending his resettlement elsewhere." (see *Ordinance No.35 of 1981*.)

1988 witnessed what has been called 'the second wave'; in other words, a wave of further newcomers from Vietnam on a large scale. This triggered another Geneva conference and resulted in an international agreement known as the Comprehensive Plan of Action, by which it was agreed that there would be screening for all irregular arrivals from Vietnam in countries of first asylum in South East Asia.

The need for screening required the development of appropriate screening processes, and these were agreed between the Hong Kong Government and the United Nations High Commission for Refugees ('UNHCR'), and specified in a Statement of Understanding reached between the two bodies in September 1988. That document included the following statement :

> "1. The Hong Kong Government reaffirms that ... all refugees will be treated according to international standards and will have access to resettlement. It further affirms its undertaking that the determination of refugee status will be in accordance with the 1951 Convention and 1967 Protocol relating to the status of refugees and UNHCR guidelines."

The criteria for determining refugee status were to be based on the UNHCR Handbook on Procedures for Determining Refugee Status under the Convention and the Protocol.

Those who were not screened in had a right of appeal to the Governor-in-Council under section 53 of the *Immigration Ordinance*. It was said by the Statement of Understanding to be a right of objection 'against refusal of refugee status'.

Those screened out — in other words, those who were classified as non-refugees — were sent back to Vietnam; either under the Voluntary Repatriation Scheme; or, for those who had to be compelled to return, under the Orderly Repatriation Programme.

Challenges to determinations about refugee status inevitably became very numerous and appeals to the Governor-in-Council impracticable, so there was enacted *Ordinance 23 of 1989* which created the RSRB. I have referred earlier to the key provisions relating to the power of that Board.

By section 5 of the *1989 Ordinance*, there was introduced the provision by which no objection could be made any longer to the Governor-in-Council against a removal order made under section 13E.

The Convention

The Convention defined, in Article 1 section A, a refugee as someone who :

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

There are a number of cessation clauses, in other words clauses which define the circumstances in which (former) refugees are deemed no longer to have refugee status for the purpose of the Convention. These clauses fall under Article 1C of the Convention :

> " This Convention shall cease to apply to any person falling under the terms of section A if :
>
> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
>
> (2) Having lost his nationality, he has voluntarily re-acquired it, or
>
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
>
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
>
> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

Article 1E is an exclusion clause :

> "This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

Other Articles of the Convention seek to accord protection of specific rights by contracting parties in favour of the refugee within their territory. So, for example, Article 13 requires that contracting states :

> "... shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property ..."

Article 17 provides that contracting states :

> "... shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment."

Similar obligations are imposed in relation to those desirous of practising a "liberal profession"; and as regards housing "treatment as favourable as possible" (Article 21); and as for primary education "the same treatment as is accorded nationals"; and with non-primary education "treatment not less favourable than that accorded to aliens generally"; and other like provisions concerning matters such as public assistance; and freedom of movement.

Article 31 states that :

> "1. The Contracting States shall not impose penalties on account of their illegal entry or presence on refugees who, coming directly from enter or present themselves without authorization ...
>
> 2. ... shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or

> they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

Article 33 is the Article which precludes refoulement to the territory where the refugee's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 34 requires contracting states :

> "... as far as possible [to] facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings ..."

IV. ISSUES OF LEGALITY

Must a refugee classified as such under section 13A be granted permission to remain pending resettlement?

The essence of the applicants' case is that section 13A(1) envisages, indeed requires, a two stage process. First, the Director is required to determine whether, applying Convention standards, a person is or is not a refugee. If that determination is against him, then permission to remain is necessarily refused, and the review procedure envisaged by sections 13D(3) and 13F is engaged, so that the RSRB is then called upon to decide whether or not the migrant is or is not a refugee. On the other hand, if the immigration officer decides that the migrant is a refugee, he retains a discretion whether or not to permit him to remain. If he permits him to remain, well and good. If not, then it follows, according to this argument, that the migrant has been refused permission to remain as a refugee, and that, naturally, ignites the review procedure, and the task then for the Review Board is to decide whether the refugee should or should not be permitted to remain; that being "a decision which the Director might lawfully make" (section 13F(5)). The Board has the same role, immigration authorities for a determination about permission to remain, for the Board has the power to take that decision itself.

This construction, it is said, arises from the very wording of section 13A, and from the consequences of a contrary view. The contrary view would have the consequence that against the refusal of permission to remain for reasons unconnected with a determination of refugee status itself, the migrant would have no avenue of review whether to the RSRB or to the Chief Executive-in-Council; and that, it is argued, can never have been intended. My attention is drawn to comments of the majority in the Privy Council judgment in **Nguyen Tuan Cuong** which show that that majority clearly contemplated that the RSRB was to have in this case a role not only in deciding whether any particular applicant was a refugee but also whether, for example, he or she had unreasonably refused an offer of resettlement.

The respondent, on the other hand, says that once she decides that a migrant is a Convention refugee, she is bound then to admit him as a refugee pending resettlement under section 13A(1) of the *Ordinance*. So much at least was evident from the Statement of Understanding by which Hong Kong was required to ensure that "all refugees ... will have access to resettlement". The applicants respond by pointing out that the Statement of Understanding is not part of domestic law; it has no legislative force, and at most can only give right to a legitimate expectation of some procedural right, but not if it conflicts with the clear intention of the legislation.

It seems clear to me that section 13A does not confer on the Director or her junior officers a discretion to refuse permission to someone who has been classified, *in an exercise conducted under section 13A*, as a Convention refugee. The section does not require that construction, and the scheme of the *Ordinance* in its material parts runs contrary to that construction. Nor in my judgment was it ever intended that the RSRB should engage in any question beyond the question whether someone was or was not a refugee.

I have used and emphasised the words "in an exercise conducted under section 13A" for the following reason. As a matter of international law,

there is no obligation upon the Director to assess the substantive merits of a claim to refugee status of those arriving in Hong Kong where there is substantial evidence that those arrivals already enjoy effective protection as refugees in the country from which they have arrived, or in any other country, for that matter.

The principle is summarised in **Minister for Immigration and Multicultural Affairs v. Thiyagarajah** (1997) 151 ALR 685, at page 702, per Van Doussa J, who thought that it was :

> "... not necessary for the purposes of disposing of this appeal to seek to chart the outer boundaries of the principles of international law which permit a contracting state to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status. It is sufficient to conclude that international law does not preclude a contracting state from taking this course where it is proposed to return an asylum seeker to a third country which has already recognised that person's status as a refugee, and has accorded that person effective protection, including the right to reside, enter and re-enter that country. The expression effective protection ... in the context of the obligations arising under the Refugees Convention ... means protection which will effectively ensure that there is not a breach of Article 33 if the person happens to be a refugee."

If there is no obligation under international law in such circumstances to assess the merits of a claim for refugee status, there can equally be no requirement under international law which precludes a contracting state from returning someone known to be a refugee to a country where his status is recognised and which has accorded him effective protection; still less where the state to which he is being sent is a Convention country. Support for that approach is found in the statement — to which reference is made in **Thiyagarajah** at page 701 — by the UNHCR in 1993 :

> "... that the return of those who have obtained effective protection in another country is permissible, subject to the conditions laid down in Executive Committee Conclusion Number 58 (1989) on Irregular Movements. ... Goodwin-Gill concludes :

> 'The most that can be said at present is that international law permits the return of refugees and asylum seekers to another State if there is substantial evidence of admissibility ...'"

That is the state of international law on the subject; and the obligation imported by the SAR Government's adherence to the Statement of Understanding is to treat all refugees according to international standards. Hong Kong's obligation according to international standards are those summarised in the minority judgment in **Nguyen Tuan Cuong**, at page 79 :

> "... the only obligations of contracting states are, first, not to punish a refugee who has entered directly from the country in which his life or freedom was threatened for a Convention reason and secondly, not to return him across the frontier of that country."

The fact that this was a dissenting opinion "... does not detract from the authority of [the] statement. The majority of the Privy Council did not find it necessary to consider the obligations imposed by the [Convention]." (see **Thiyagarajah** at page 698).

As for domestic legislation, those who constituted the minority in the Privy Council judgment took the view that domestic legislation did not import an obligation to make an assessment of the substantive merits of a refugee claim in circumstances such as those of the applicants. The majority, at page 73, defined the prime issue in the case as whether the applicants were "... entitled to or at any rate received a *determination under section 13A of their claim* for refugee status ... ." (emphasis added); and the order of the Judicial Committee, directed at the Director of Immigration, and from which all since has flowed, was that she "... consider the applicants claim to remain in Hong Kong as a refugee ..."

Although, as it seems to me, neither international law nor domestic law imposes an obligation upon the Director to consider the substantive merits of claims to refugee status where there is substantial evidence of effective protection in another country; that said, the Director has in fact engaged in an

assessment under section 13A of the substantive merits of a claim to refugee status. She has done so because she was required by an order to do so.

So I return to the question whether after an exercise conducted under section 13A the Director has a discretion to refuse permission to remain as a refugee to someone who, upon an examination of the substantive merits of the claim to refugee status, has been categorised as a refugee.

In passages which have loomed large in argument before me, and which played a significant part in the Director's approach to the decisions which she made, Sir John May, delivering the judgment of the majority said this :

> "Further, as was the view of Sears J. [1995] 3 H.K.C. 373, 376-377, where section 13A provides that the appropriate officer may permit a previous resident of Vietnam to remain in Hong Kong as a refugee, there must impliedly be provided a power in that officer to refuse permission to such a person. Thus at least when the present applicants arrived in Hong Kong waters in their boat and it was known at once, or within a very short time, that they were previous residents of Vietnam, there was a duty on the immigration authorities to ask them whether they were seeking to remain in Hong Kong as refugees. Clearly they were and equally, in the light of the administrative decisions which the director had taken, his decision on such a request would have been to refuse it.
>
> Indeed, in substance this is what has already occurred. By electing to be placed in a detention centre after the playing to them of the recorded message, the applicants implicitly sought permission under section 13A(1) of the Ordinance to remain in Hong Kong as refugees pending resettlement elsewhere. No other provision of the Ordinance provides for such permission, and the recorded message, however discouraging, clearly held out some hope of it. By the formal refusal notices, if not earlier, permission was equally clearly refused. Thereupon it became the duty of the director under section 13D(3) to cause to be served notices of the right to apply for review. 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 will 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 section 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."

Again, at page 77, the majority returned to the theme that :

> "... It is at least possible that if these applicants obtained 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."

In so far as the majority alluded to the power of the immigration officers to refuse permission to remain, it is instructive to note the way in which the matter was put, for whether to that end or not, the way in which it was put holds the key to the correct interpretation of section 13A in so far as it provides for the discretion to refuse permission to remain : "….. where section 13A provides that the appropriate officer may permit *a previous resident of Vietnam* to remain in Hong Kong, there must impliedly be a power in that officer to refuse permission to *such a person*." (see page 75)(emphases added). "Such a person" relates back, not to a person categorised as a refugee, but rather to "a previous resident of Vietnam". And the passage accurately reflects the way in which the section is drawn. There is, I believe, a flaw in the approach to construction which I am invited by the applicants to adopt, and the flaw is demonstrated by the words of he section as the section is drawn, and there is no need to go outside the section —whether to history, or to the Statement of Understanding. The section says that the immigration officer "may permit any person who was previously resident in Vietnam ... to remain in Hong Kong ...". It does not say that the "immigration officer may permit any refugee to remain in Hong Kong pending his resettlement". Phraseology along the latter lines would carry the argument of the applicants further. What the discretion is directed at, in so far as there is a discretion, is at someone who

is a resident or former resident of Vietnam and who satisfies the conditions of subsections (a) and (b) of section 13A. The section does not confer a discretion to permit a refugee to remain or not. It permits an officer to decide whether a Vietnamese resident may or may not remain in a particular capacity. The section does not say in terms what is to happen to those who are in fact refugees. A correct analysis of the section is that it assumes that there exists a category of persons who are in fact refugees; and it is implicit that those so categorised are allowed as a matter of course to remain in Hong Kong pending resettlement. It is implicit, in my judgment, from the section and from other provisions within Part IIIA of the *Ordinance* that once such a resident is classed under section 13A as a refugee, permission to remain is assumed; it must be given. Were an immigration officer correctly explaining the effect of this section to an applicant he would say something along the following lines :

> "All those classified under section 13A as refugees are entitled to remain in Hong Kong pending resettlement. I might treat you as a refugee. I might not. If however I classify you as a refugee, you will be allowed to remain pending resettlement. If I do not so classify you, you may, if I permit it, remain in some other capacity, but the one capacity in which you may not then remain is that of refugee, for I have decided that you do not possess that status."

And if Sir John May's judgment is to be construed on this point as definitive of the intent of Part IIIA and of the extent of the discretion of the immigration officer under section 13A(1) — and I do not think it was so intended — then, even so, that does not avail the applicants' case on this point; for at page 76B the majority say that :

> "The interpretation of Part IIIA of the Ordinance adopted in the present judgment and by the Hong Kong courts appears to give effect to the purposes of the Statement of Understanding between the Hong Kong Government and the United Nations High Commission for Refugees ... . The document provides that all refugees *will* have *access to resettlement ... .*" (emphasis added)

If the correct interpretation of the *Ordinance* does or is intended to give effect to the Statement of Understanding, then it must follow that those classified as refugees must be permitted to remain pending resettlement; otherwise there

arises a breach of the undertaking in the Statement of Understanding that they will have access to resettlement.

In so far as the applicants seek nonetheless to distance themselves from the Statement of Understanding, and suggest that it does not sit well with the *Ordinance* in this regard, it appears evident from a reading of the minority judgment too that the acceptance in fact of relevant international refugee obligations and understandings, namely the Convention and the Statement of Understanding, "underlies the statutory provisions at issue in this appeal and makes it necessary to examine their background in international law before attempting to construe them." (see minority judgment at page 77G **Nguyen Tuan Cuong**).

The limited jurisdiction of the RSRB provides further and cogent support for the interpretation for which the respondent contends. The extent of the Board's power was not an issue upon which the majority's decision in **Nguyen Tuan Cuong** turned, and the comments in the majority judgment to which I have referred about the kind of decisions which it might make — implying that it could look at questions such as reasons for refusing a resettlement offer — were discursive. The decision of the majority depended upon the majority view that, on the facts, the applicants had applied for a determination of refugee status and, having done so, had been entitled to a determination; and, further, that the courts below had wrongly exercised the discretion whether to grant the relief to which in the circumstances the applicants were *prima facie* entitled.

A person against whom an adverse decision has been made under section 13A(1) may apply to the Board for one purpose only, namely, "to have the decision that he may not remain as a refugee reviewed" (section 13F). If it is clear that that phrase is directed at only one decision and not two, then it must follow that the decision open to the immigration officer under section 13A(1) is also a single and not a two-part decision. So it becomes necessary to ascertain what it is that the Board is entitled to review. Those in

the minority in the Privy Council were in no doubt that the matter which the RSRB was required to decide "was whether the applicant had the status of a refugee from Vietnam." (see page 83B). They pointed out that "It was after all called a 'Refugee Status Review Board'. Its function was to make a decision 'as to the status of the appellant'."

Section 13F(5) requires from the RSRB a decision as to status and as to his continued detention. No other decision is required. None else is permitted. "The status of a person is his legal position or condition." (see *Jowitt's Dictionary of English Law, Vol.2*, page 1695). It is a concept which envisages that someone is clothed with certain attributes. It arises from a determination of facts, not an exercise of discretion. In other words, it is for the Board to decide as a question of fact whether an applicant is or is not clothed with those attributes, and there are consequences which automatically flow from its determination. The very injunction that the Director is required "to give effect to that decision", presupposes that some further action or decision is automatically required as a result of the Board's determination which it is for the Director to take or make. If the Board is empowered to decide not only that someone is or is not a refugee, but also that he should be, or he should not be, permitted to remain in Hong Kong, I cannot see how that latter decision can properly be called a decision as to status. And if the Board has power to say that someone should be allowed to stay, does it then also have power to recommend conditions? And do those recommendations constitute "a decision as to the status of the appellant"?

Conversely, if it is not a question of the Board making recommendations that a refugee be permitted to stay and as to conditions of his stay, but it is rather a question that the Board is entitled to grant permission to stay and itself to impose conditions (for it is said that the Board may make any decision which the Director might lawfully make under the *Ordinance*) then, since the section requires the Director to give effect to the Board's decision, what is there still for the Director to do? The phrase '... the Director shall give effect to such decision' only makes sense if all that remains for the Director is

to give effect to the Board's decision by granting permission to remain as a refugee if there is a decision favourable to the appellant, and to refuse such permission if there is not. And the phrase 'being a decision which the Director might lawfully have made under this Ordinance' does not mean that the Board may in respect of an applicant for review exercise any and every power available to the Director under the legislation in respect of former Vietnamese residents or those classified as refugees. It means only that such decision as to status and detention that it makes must be one which the Director is in that regard entitled by law to make.

Subsection (6) of section 13F is significant too, for it stipulates or declares that pending the decision of the Board the appellant has not by reason of his application the right to remain in Hong Kong. That would be an odd provision if it were intended that the Board itself were engaged in reviewing a discretion to permit someone to remain in Hong Kong; and the point gains some ground when the subsection is examined in contrast to section 53B of the *Ordinance* which provides that where a removal order has been made under section 19, it is not to be executed pending appeal.

Section 59 of the *Ordinance* gave to the Governor in Council regulation making powers pursuant to which regulations were made, entitled '*Immigration (Refugee Status Review Boards) (Procedure) Regulations*", and I note that regulation 7 prescribes that for the purpose of deciding whether to pursue an appeal to the Board and in order to decide what representations to make to it, certain files must be made available by the Director for the inspection of the applicant's representative. Those files are :

> ".... files containing copies of —
>
> (a) the determination of the immigration officer not to allow the person detained under section 13D(1) refugee status and the reasons for that determination; and
>
> (b) all material upon which this determination was based, including any questions put to that person and his answers in respect thereof,"

These regulations were made on 16th June 1989, at the same time as the enactment of *Ordinance 23 of 1989*. If the regulations are to be given any weight as an aid to construction, they support the construction for which the respondent contends, for it seems that it was contemplated when they were made that the section 13 decision under review was a decision about refugee status and nothing else.

That, in the context of the factual setting in which the legislation was framed, should come as no surprise. The fact is that prior to 1988 all those arriving from Indo-China were admitted as refugees pending their resettlement elsewhere. None was turned away. Once screening came into effect, "[t]he whole point of the screening procedure was to admit as refugees only those persons who would have a claim under international law to be received by a host country as refugees from Vietnam." (see **Nguyen Tuan Cuong** at page 83F). The point was not, in other words, to admit some refugees and to turn others away. In the days when this legislation was enacted, turning someone away gave rise, in practical terms, to one of two consequences — either refoulement, or forcing arrivals out to sea; neither of which course was morally acceptable nor in accordance with the international requirements to which the Hong Kong authorities had said they would subscribe.

For the reasons which I have provided, I am satisfied that upon a true construction of the *Ordinance* it was not intended that, upon the grant or recognition of refugee status under section 13A, the Director or her immigration officers were required then to determine whether, nonetheless, he or she should be refused permission to remain as a refugee pending resettlement.

Classification as a 'refugee from Vietnam in China?

The Director in this case classified each applicant as a "refugee from Vietnam in China". The classification "refugee from Vietnam in China"

is not a classification to be found in the *Ordinance*. It was a classification carefully couched by the Director and, as can more readily be appreciated after the advantage of full argument in this case, intended to encapsulate or reflect her view that whilst the applicants were, in respect of Vietnam, refugees, they were not refugees in respect of China; that they had settled in China; that settlement or resettlement was available to them there; and that therefore they had no claim to remain in Hong Kong for any longer than was necessary to arrange for their return to the place where they had been settled and where resettlement awaited them. Refugee status "... is always a status relative to a particular country or countries," (see **Nguyen Tuan Cuong** at page 79D), and in discussing the question of obligations under international law, the minority in that judgment venture the conclusion that "Hong Kong ... has no obligation in international law to treat immigrants from China differently from any other Chinese immigrants merely because they were once resident in Vietnam. The fact that they may still have refugee status in relation to Vietnam is irrelevant". I cite those two passages not for their reference to Hong Kong's obligations or lack of them in relation to the applicants — for the judgment is a minority judgment — but to highlight the concept, which is not controversial, of refugee status in relation to a particular country; in this case, in relation to Vietnam.

In following the order of the Privy Council "to consider the applicant's claim to remain in Hong Kong as a refugee in accordance with Part III of the *Immigration Ordinance*," the Director was bound to consider whether the applicants were or were not refugees in relation to Vietnam. There was no suggestion — or none still pursued — that they are refugees from the Mainland in any Convention sense; nor could any such contention arise under section 13A or any aspect of Part IIIA of that *Ordinance*. So, in granting permission under section 13A of the *Ordinance* for the applicants to remain, the Director was deciding that in relation to Vietnam they continued to be refugees. This was not an exercise which engaged the Director for long. Indeed, I was told by Mr Marshall S.C., who appeared on behalf of the Director, that an assumption in favour of the applicants was made to that effect. The

true question which had then to be addressed was the question of resettlement. It was hardly open on the acknowledged facts of these cases, it seems to me, for the Director to come to any conclusion other than that the applicants were in relation to Vietnam refugees, for none of the cessation clauses of the Convention applied.

The classification means that the Director was then obliged to treat the applicants as those screened in for the purposes of the *Ordinance*; and they thereupon because Vietnamese refugees as defined by section 2 of the *Ordinance*. So, too, and for reasons which I have given, the Director was indeed bound to permit each such applicant to remain in Hong Kong pending resettlement.

The obligation to resettle

One of the questions posed for my determination relates to the meaning of "pending resettlement elsewhere". Does it mean providing a person with the opportunity to seek resettlement in a third country?

The applicants argue that 'pending resettlement elsewhere' is a term which reflects or is intended to reflect legal policy, and that it imports an obligation upon the Director to provide the refugee with time in which to try to persuade another country to admit him as a refugee.

In my judgment, the phrase is not inserted into section 13A with a view to enabling the refugee to apply for such resettlement as he sees fit. The phrase is there to delineate the duration and purpose of his stay in Hong Kong. It is not an open ticket for the refugee to seek resettlement, or to seek such resettlement as he sees fit. It does not envisage that resettlement will necessarily be in a country other than that from which he has travelled; it merely envisages resettlement in a country other than the one from which, by reason of the conditions described by Article 1 of the Convention, he was displaced. In the context of the *Ordinance*, the phrase connotes the act of restoring stability to the life of the refugee after a period of turmoil and political

adversity, to the degree that the refugee is admitted to a country where he may permanently reside and be free from any danger of forced return to the place of previous actual or perceived persecution. Once that stability may to that extent be restored by an offer made by a Convention country that the refugee will be accepted as a permanent resident, granted a durable solution, and not refouled, there is then no obligation upon the Director to wait whilst the refugee explores other avenues of potential resettlement.

If there is a case where an offer of resettlement is made and it is suggested that there is a reasonable excuse for not accepting the offer, then of course the Director is bound to consider the excuse offered. It might be that there is some circumstance relating to the proposed resettlement conditions which constitute a reasonable excuse. So, too, if an offer from another country is in the pipeline, one which the refugee would prefer to accept, then no doubt the Director would, if there seemed some reasonable prospect of success, wait a while before returning to the available resettlement option; but unless the 'pipeline offer' constituted a reasonable excuse for refusing the 'live' offer, then there would be no obligation upon the Director to await the outcome. In this particular case the Director does not say that she will, even at this stage, send the applicants to the Mainland come what may, regardless, that is, of any offers that may come from other countries.

The point is made in the evidence of a Mrs Austin, filed on behalf of the applicants, that :

> "[r]esettlement of all other Vietnamese refugees has been conducted on an individual basis under the auspices of the UNHCR which writes up detailed resumes of each refugee for submission to Consulates in a positive way rather than a negative one. If one country rejects them for resettlement, efforts are made with another country or countries, and there are many more resettlement countries than Mr Choy purports to have received an answer from in individual cases. ..... Many of the applicants have close relatives in the United States and other resettlement countries which increase the likelihood that they would be accepted by those countries for resettlement."

The reference to Mr Choy receiving answers from resettlement countries is a reference to evidence filed by Mr Choy that in May 1997 :

> "….. the then Security Branch started ... to explore with the local consulates of resettlement countries the possibilities of accepting ECVIIs from Hong Kong. We were however informed by the Secretary for Security on 21 May 1997 that Australia, Canada and USA has declined to offer resettlement for the ECVIIs. We were further informed on 2 June and 7 June 1997 that Sweden and Japan respectively had also declined to offer resettlement for the ECVIIs."

In the circumstances of the applicants long residence in China, those responses are perhaps not surprising. But to the point made by Mrs Austin, it must be said that the position of the applicants is one which is markedly different from those of refugees who have arrived in Hong Kong in the past. Put simply, those who arrived in the past, those to whom she refers as "all other Vietnamese refugees" were not refugees who, on being "screened in", already had a resettlement offer on the table.

Section 13E

The question next posed is whether the Director may, as in this case, immediately after granting a 'refugee from Vietnam in China' permission to remain in Hong Kong under section 13A of the *Ordinance* make a removal order in respect of such a person.

The argument is that this can never have been intended. It is part of the argument in support of the contention that upon a true construction of section 13A, if the Director is minded to remove someone who is a refugee he should refuse permission to remain, leaving the refugee with the right to appeal to the RSRB. It is said by the applicants that the *Ordinance* envisages that section 13E will not come into play until after something happens after permission to stay has been granted; that the Director cannot or ought not to be permitted to use the power to land purely for the purpose of making a removal order under section 13E against which there is no right of appeal or review; and that the use of section 13E in such circumstances "makes a mockery of the right

conferred on the refugee to see if he can find some country that will accept him and his family for resettlement".

I do not agree that section 13E is unavailable to the Director in these circumstances. Let us assume that the applicants had not arrived here from Mainland China having lived there for as long as they had, but that instead they had arrived in 1989, say, directly from Vietnam; and assume then that a screening exercise had been conducted as a result of which it was determined that they were Convention refugees. They would then have been granted permission to remain in Hong Kong as refugees pending resettlement elsewhere; indeed in my judgment the Director would have been obliged to grant them that permission. But assume further that within two weeks — unusually swiftly because, perhaps, wheels had earlier been put in motion on their behalf, and before the screening exercise had been completed — the authorities of the United States had offered to settle them there, to allow them permanently to reside in the USA. Had they without reasonable cause refused that offer, the next lawful step available to the Director would have been the making of an order under section 13E that they be removed from Hong Kong. I fail to see why in such circumstances the powers under that section would not have been exercisable, and there would have then been no question of a review by the RSRB, because by then, and quite properly, the Director would have granted permission to stay. If that is correct, that the use of section 13E was then available, there is in logic no distinction between the powers lawfully available to the Director in that situation and those, on the other hand, available when the refugee has the resettlement offer in his pocket on the day upon which he is screened in as a refugee, but has evinced a determination to reject that offer and has no reasonable cause for so doing.

Nor do I agree that it can properly be said that the Director used the power to land under section 13A 'purely for the purpose of making an order under section 13E'. She had in light of the fact which she found, namely, that the applicants were indeed still Convention refugees, no option but to permit them to land.

It is contended that the course adopted is drenched in artificiality. In so far as there is an appearance of artificiality, that is not the creation of the Director. It is the product of the fact that Part IIIA of the *Ordinance* was enacted to deal with refugees with a history entirely different from that of these applicants; of the terms of the order made by the Privy Council which required the Director to determine their status; and of the fact that at the time of that determination there was already an offer of resettlement from a Convention country which could swiftly be put into effect. The fact that the lawful use by the Director, in quick sequence, of disparate powers in the *Ordinance* would create an air of artificiality did not then require the Director to stand the *Ordinance* on its head, and to read into it procedures and obligations which it did not require.

Padfield

> " Parliament must have conferred the discretion [on the Minister] with the intention that it should be used to promote the policy and objects of the Act; the policy and the objects of the Act must be determined by construing the Act as a whole ..... if the Minister ...so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if the person aggrieved were not entitled to the protection of the court."

(per Lord Reid in Padfield v. The Minister of Agriculture, Fisheries and Food [1968] AC 997, 1030)

This principle is advanced by the applicants who contend that the Director has abused the discretion conferred upon her by the legislature in sections 13A and 13E.

It is said that the policy and object of the legislation is that former residents of Vietnam have a right to require the Director to consider their applications for permission to remain, and if they fail to obtain permission from the Director, to have then an opportunity of persuading the RSRB to grant that permission, and that by the way the Director has approached this exercise she

has frustrated that policy. The permission to remain has been utilised, is the implication, as a device to avoid recourse by the applicants to the RSRB and to enable the Director then, without such recourse, or indeed any other avenue of review, to utilise section 13E. This contention cannot survive my conclusion that once it was determined (and the determination is not challenged) that the applicants are refugees in relation to Vietnam, there was then no remaining discretion to refuse them permission to remain as such.

The main thrust of Mr Dykes' submissions under the 'Padfield Illegality' heading is that the discretion under section 13E has been abused. It is said to be inconceivable that the policy and objects of Part IIIA of the *Ordinance* are served if the words 'at any time' are applied by the Director literally, so as to enable permission to remain and an order to remove to be granted and made at the same time. There must at least, the argument goes, be an implicit limit on the words 'at any time', so that, for example, a person waiting to be screened could not within the lawful exercise of that discretion be the subject of a section 13E order. I am by no means sure that that is right, for there may in a particular case be good reason for requiring an applicant to leave. But be that as it may, that is not the factual setting in this case; and it is only the use of the discretion within the factual setting which existed when the Director made her order with which I am concerned.

For the purpose of the present point, it is sufficient to say that the policy and object of Part IIIA of the *Ordinance* was to enable Hong Kong to exercise immigration control in respect of a particular class of persons arriving in this small territory in large numbers, that is, those former residents of Vietnam seeking first asylum in Hong Kong; to preserve the right to refuse entry to non-refugees; and to give effect to an internationally accepted approach to those who were Convention refugees, by permitting them to enter Hong Kong for a limited purpose, namely, until they were resettled elsewhere; and then to remove from its shores those who could reasonably be expected to leave because there was now a place for them to go; a place which afforded them a permanent home.

Once the Director had in this case concluded that there was a permanent home to which they could go, in which indeed they had lived for more than ten years, and where there was available a durable solution, and that they were not to be refouled to Vietnam, her decision to send them (back) to that permanent home did not run counter to the policy and objects of the legislation; on the contrary, it was well within it.

The Reasons given for the Removal Orders

There is a root and branch attack by the applicants on the validity of the reasons given by the Director for the making of the removal orders. They say that the Director has not asked the right questions, and has not applied the correct principles. It is argued :

(1) that the Director has taken into account Conclusion 58, whereas Conclusion 58 is not relevant to the decision which she had to make about resettlement and whether a removal order was justified;

(2) that the Director thought that as a result of Conclusion 58 she was bound to order the return of the applicants to the Mainland, whereas if Conclusion 58 were relevant, it was intended to offer guidance only;

(3) that the Director has applied Conclusion 58 questions to these applicants, thereby asking whether they had been and would be treated according to "basic human standards" whereas the correct question was whether they had been and would enjoy those Convention rights embodied in Chapters II-V of the Convention; and

(4) that the Director has misunderstood the judgment of the majority in the Privy Council, believing them to say that the applicants had, if they enjoyed certain rights on the Mainland lost entitlement to consideration for resettlement in any country other than the PRC, whereas the Privy Council were not making such a suggestion, although if they were they could not legislate to that effect, and that such a contention was contrary to international law.

Conclusion 58

The Executive Committee of the High Commissioner's Programme was established in 1957, and its terms of reference "include advising the UN High Commissioner for Refugees, on request, in the exercise of [his] statutory functions"; and on allied matters (see *Goodwin Gill "The Refugee in International Law"* page 7). "It is currently made up of 44 countries. ...The Executive Committee every year adopts what it calls conclusions, which are not binding legal norms but they are guidelines for both the UNHCR and states in terms of the way they deal with refugee issues." (speech before the Legal and Constitutional Legislation Committee of the Australian Senate by Mr Fontaine, Regional Representative, Office of the UNHCR : as reported in Hansard (Australia) for 3 February 1995). At its 40th session, which took place in 1989, the Executive Committee addressed the "Problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection," and issued recommendations for the treatment of such persons. Those recommendations or guidelines are articulated in the document issued by the Committee, called Conclusion 58.

In so far as may be relevant to these proceedings, Conclusion 58 provides as follows :

> a) The phenomenon of refugees, whether they have been formally identified as such or not (asylum-seekers), who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere, is a matter of growing concern. This concern results from the destabilizing effect which irregular movements of this kind have on structured international efforts to provide appropriate solutions for refugees. Such irregular movements involve entry into the territory of another country, without the prior consent of the national authorities or without an entry visa, or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation. Of similar concern is the growing phenomenon of refugees and asylum-seekers who wilfully destroy or dispose of their

> documentation in order to mislead the authorities of the country of arrival;
>
> b) Irregular movements of refugees and asylum-seekers who have already found protection in a country are, to a large extent, composed of persons who feel impelled to leave, due to the absence of educational and employment possibilities and the non-availability of long-term durable solutions by way of voluntary repatriation, local integration and resettlement;
>
> .....
>
> 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 as recommended in paragraphs (c) and (d) above;
>
> 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 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. Where such return is envisaged, UNHCR may be requested to assist in arrangements for the re-admission and reception of the persons concerned;
>
> ....."

It is appropriate at this juncture to recall the exercise upon which the Director had embarked. As a result of the order which she was obeying, she was not deciding whether or not there was substantial evidence that persons claiming to be refugees had the benefit of effective protection elsewhere, and should therefore be returned to the place of protection. She had embarked on a section 13A examination of the substantive merits of a claim to refugee status and had, furthermore, decided that the applicants were refugees and had, in consequence, granted them permission to remain as refugees pending resettlement.

The phrase "pending resettlement" imports, in my judgment, a protection for the migrant, or applicant, which goes beyond the confines of that which is contemplated by Conclusion 58. Conclusion 58 mirrors the principle

of international law, which I have discussed earlier, that the authorities of a state are quite entitled to return a migrant to a country where effective protection has been granted, and that that may be done even without an examination of the substantive merits of a claim to refugee status. So, too, if the authorities of that state happen to know or to be satisfied that the applicant is indeed a refugee under Article 1 of the Convention, still there is no call on the asylum of that state when protection has been granted elsewhere. But where the state at which the migrant has most recently arrived has undertaken by law to allow the migrant to remain pending resettlement, that is a different story; for 'resettlement' has a special connotation.

'Resettlement' means to 'restore to settled state or condition' (*New Oxford English Dictionary*). It implies a condition of permanence, rather than one of temporary refuge; a restoration of stability to the life of the refugee.

The difference between the 'protection' to which Von Doussa J in **Thiyagarajah** and to which Conclusion 58 refers, on the one hand, and, on the other, 'resettlement' as contemplated by Part IIIA of the *Ordinance* is, I believe, evident from the following Note :

> "It is the return of refugees to their own community or their own integration in a new one which constitutes a permanent or durable solution ... International protection is of an essentially temporary nature and is the sum of all the action which seeks to achieve the admission of a refugee into, and secure his stay, in a country where he or she is not in danger of refoulement and can enjoy basic rights and humane treatment until the above objective is achieved – that of renewed belonging in a community."

("Note on International Protection" UN Document A/AC.96/680, July 15, 1986; referred to by Hathaway in "*The Law of Refugee Status*", page 189.)

What Part IIIA contemplates by use of the phrase 'pending resettlement elsewhere' and the condition of stay that an offer of resettlement shall not without reasonable excuse be refused, is that the successful claimant to refugee status will be permitted to remain in Hong Kong until such time as

there is received by him an offer of a permanent and durable solution — as opposed to an offer of temporary refuge and protection — in a third country (or even in the country from which he originally fled).

This goes further than Conclusion 58, for Conclusion 58 is primarily designed for a situation where no durable solution has been found and where refugees feel impelled to leave the country of protection "due to ... the non availability of a long term durable solution" (paragraph (b)) "in order to find durable solutions elsewhere." (paragraph (e))

Therefore, had the Director made her decision to remove the applicants on the footing solely that they were protected within the meaning of Conclusion 58 and gone no further, the applicants' claim for relief would have been raised to a solid plateau. How far she did go, I shall shortly consider. But it is as well first to consider what it was she was required to address.

The Director's function

Having granted them permission to remain in Hong Kong as refugees pending resettlement, the essential questions which arose were then simply these : Was an offer of resettlement made? If so, did reasons advanced by the applicants for refusal of the offer constitute a reasonable excuse?

The collective mind of counsel and the court has been focused heavily on what happened to these applicants before 1995, more especially before they came to Hong Kong. Were they adequately protected? What rights did they have? Did they or did they not have household registration (with which came a host of other rights)? Did they or did they not in the past enjoy a durable solution on the Mainland? But whatever had happened in the past, the first question was whether there was **now** an offer of resettlement, properly so called? Whether or not someone had slipped through the net of officialdom in the past, the fact that the authorities of the Mainland were now offering to take in these applicants after their own interviewing exercise — a

scenario wholly different from the circumstances in which the applicants had first found themselves going to China — meant that in the future they were less likely to escape that net.

Once the Director was satisfied that an offer of resettlement had been made, there remained then only one issue for her to deal with, and in the circumstance of this case, that involved an examination mostly of the past. The question was whether the applicants' refusal to go back to the Mainland was a refusal without reasonable excuse; and the applicants say that given their past treatment, and the way in which the double backers were treated, they have such a reasonable excuse.

The purpose and objective of Part IIIA of the *Ordinance* is that those screened in be permitted to stay pending their removal to a place where they will be restored to a settled state or condition, where a durable solution, that is, integration into a new society, is promised; and it is a condition of a refugee's stay here that once the offer comes through, he must go, unless there is reasonable excuse not to go.

There are a number of situations in which a removal order made against the background of the present circumstances would be unlawful :

1. If the Director considers that the purpose and limitation of stay has crystallised because the refugee can now be resettled elsewhere but has misunderstood the importance of the word 'resettlement' and the refugee is not being sent to resettle but is to the Director's knowledge being sent without consent to a place of mere temporary refuge, that would not be a proper exercise of the Director's discretion. The order would have been made on an assumption that the refugee had unreasonably refused an offer of resettlement, whereas all that was offered was protection short of resettlement.

2. If an offer of resettlement is in fact made but the Director does not then take into account excuses offered, that would be unlawful.

3. If excuses are offered and the Director makes a decision in respect of that excuse which is irrational, the court would intervene.

In deciding whether an offer constitutes an offer of resettlement, the Director is not bound to examine whether the country of proposed resettlement will observe and fulfil each of its Convention obligations. The Director is entitled to assume that a Convention country will, in the fullness of time, do so. All that the Director needs to be satisfied about in the case of a Convention offer is that the offer is one of resettlement and that the refugee has no reasonable ground to refuse it. It is the offer which is important, and if the refugee can show that he is unlikely ever to be resettled in fact, in the sense of being afforded a durable solution, or integration into his new community, then that would constitute a reasonable excuse not to accept it.

The resettlement offer

Was there an offer of resettlement? In so far as the applicants contend that there has been no such offer, that contention, with respect, denies reality and the facts known full well to the applicants. I accept that the Notices of Determination did not constitute the offer. But the offer of the Chinese authorities to take back and permit permanent residence to all the applicants, whether verified or not, and on a footing that went well beyond any question of mere temporary refuge; and the contention that the applicants should not be expected to avail themselves of that offer, is what this case is all about. The agreement of the Chinese authorities in March 1995 to take back these applicants for the purpose of resettlement is spelt out in the Respondent's case to the Privy Council, and the judgments of the Court of Appeal in **Nguyen Tuan Cuong** were suffused with references to China's willingness to resettle these applicants.

Bokhary JA (as he then was) at (1996) 6 HKPLR 62, page 74, in a dissenting judgment which favoured the applicants, stated that :

> "On the evidence it is plain that by now at least China so unquestioningly properly settles such persons that any such person arriving here from China nowadays would arrive shorn of any Vietnamese refugee status which he or she might once have had …. But is it plain that the position in China has always been what it now is, so that the appellants must have been properly settled in China before coming here?"

And Mortimer JA (as he then was) had this to say (at page 83 of the same report) :

> "China has undertaken not only to take the applicants back, but also to accord each household registration with all that that entails. Mr Dykes questions whether these undertakings will be fulfilled. But as undertakings by a sovereign power there is no reason to believe that they will not be honoured once the administrative process has been completed."

Nothing could be clearer than that, and it was the applicants' full knowledge that that offer in those terms was alive, and their determination not to accept it, that drove them to fight tooth and nail, and successfully, to resist going back. The fact that the offer came before the latest screening exercise is, for reasons I have explained, not to the point.

The Director's actual approach

The question then remaining was whether there was reasonable excuse for refusing to go back, and whether to make the removal order in the light of that refusal; which takes me back to Conclusion 58 and the other reasons advanced by the Director.

If in this case all that the Director had done was to ask whether the conditions for return in Conclusion 58 were fulfilled, and had acted on that footing alone, then she would, in my judgment, have acted unlawfully.

But that is not what happened, and that is not what the Notice of Determination says.

In relation to Conclusion 58, Mr Choy states that :

> "The Director has considered the application of Conclusion 58 …. The Director finds that the protection offered by China and UNHCR well exceeded the usual situation which the Executive Committee had in mind in formulating Conclusion 58. It was not merely protection but the provision of a durable solution. …"
>
> "The Director has also considered the application of the words of Conclusion 58 in respect of after return and 'until a durable solution is found for them'. This again is in the context of the historical and continuous arrangements to deal with this refugee situation on the part of China and the UNHCR. Where in respect of individuals a satisfactory durable solution was granted but abandoned by the individuals concerned the restoration to that solution, in this context, in the Director's view constitutes 'a durable solution found for them'. In this context 'finding a durable solution' includes 'restoring them to durable solution'. In other refugee situations engaging Conclusion 58, this may be different because very often there will be an irregular movement from the country of protection from a situation of temporary protection at a time when durable solutions have not yet been found or fully implemented although planning for them may be more or less advanced. In such cases the context of treating in accordance with recognised basic human rights will often involve doing so in a solution of temporary protection such as a refugee camp. After return to China, within this particular refugee situation, it will be a procedure of restoring the old durable solution and in the case of those who have failed to provide correct details of their identity and place of settlement a preliminary enquiry into that matter. The Director is confident that in that temporary period they will be treated in accordance with their recognised basic human rights and given protection as refugees. The Director also finds that China will provide all returnees with a satisfactory durable solution even in rare cases where it is not possible to reactivate the actual previous durable solution formerly provided."

(see paragraphs 17 and 19, affirmation of 22nd November 1997)

The Director was not there merely applying the test of effective protection envisaged by Conclusion 58; she was moving beyond that and considering the prospect of a durable solution; in other words the question of resettlement properly so called.

The fact that the Director went beyond a consideration of mere protection to consider also the question of a durable solution is evident from the Notice of Determination itself :

> "(a) you were granted a durable solution and protection in China … ." (emphasis added)

True though it is that that paragraph relates to past treatment and not an assessment as to the future, it is not a paragraph which is to be scrutinised in isolation. It shows that the question of a durable solution, a permanent resettlement, was well in the Director's mind and paragraph (d) of the Notice is, although not easy to interpret, a reference to the future and to the rights which the Director (or Mr Choy) believes the applicants will enjoy after their return. More of paragraph (d) shortly.

Was the Director wrong to have addressed Conclusion 58 at all? I think not. It would have been odd had she not done so. The question whether it was reasonable of these applicants to refuse to return to China had, it seems to me to include a consideration of the fact that they were quite different from other refugees who had come to Hong Kong seeking asylum here in the late 1970s and during the 1980s; and she had to ask herself whether there was an element of asylum shopping, and to ask what approach the international community was entitled, indeed encouraged, to adopt in relation to such persons, and to take that into account. That is what Mr Choy did.

I am also satisfied that in addressing Conclusion 58 the Director was not saying that the fulfilment of its criteria gave her no choice but to return the applicants to the Mainland. It was a factor amongst others in the whole picture which drove her to make the order which she made.

As for the reference in the Notice of Determination to the fact that the applicants have moved in an irregular manner from the Mainland, it is argued that it is illogical to deploy that as a reason for removal, and that the

Director is not required to remove those who enter or travel to Hong Kong irregularly. The answer is that the Director does not contend that the irregular manner of movement to Hong Kong **required** removal; it is a phrase borrowed from Conclusion 58 and was a factor she was entitled to take into account.

Convention Rights

As we shall shortly see, the Director thought it incumbent upon herself to consider whether the applicants had or had not enjoyed the benefit of a host of rights, such as the right to employment and education and housing when they were in China, and whether those rights would again be available to them. In my judgment is it not normally incumbent upon the Director when an offer of resettlement is made by a Convention country then to engage in an extensive investigation to ascertain whether the promises of that country to resettle the refugee in the true sense of that word is to be believed. However, if after a sojourn of over ten years a refugee can show that he has enjoyed none of the rights of that ilk — rights which may be termed the rights which the Convention expects signatory states to confer upon refugees taken in for resettlement — then that historical fact may reasonably be deployed in support of refusal to return, although the fact that rights have not been enjoyed in the past does not necessarily mean that they will not, in a new situation, be extended in the future.

Reliance on the Privy Council Judgment

That the Director went considerably further than a consideration of Conclusion 58, and the question of bare protection to which that advice or guidance is directed is also evident from paragraph (d) of the Notice of Determination. The Director apparently found that :

> "… in terms of the judgment of the majority of the PC in Nguyen Tuan Cuong and others you have lost entitlement to consideration in Hong Kong for resettlement overseas other than in China by return to China."

The purport of that sentence is not as clear as one might like. In effect, as I u denied the right to work, to marry, to own land, to have household registration and their claims, where advanced, of refoulement were made out that the applicants could resist being returned to China because they had reasonable excuse for refusing China's offer. … If they are not made out, the individuals remain China recognised refugees but lose their entitlement to resist return to China. (See the affirmation of Mr Choy dated 22nd November 1997, paragraphs 24 and 25).

The passage upon which the respondent had evidently been advised to fix her eyes and mind for the purpose of constructing a test to see whether there was reasonable excuse for refusing to take up the offer of resettlement was the following passage from the decision of the majority :

> "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 the function of their Lordships this appeal to attempt either to resolve them or to forecast how they will be resolved. If however they are made out it will be open to the review board to find that the applicants have never lost their refugee status and perhaps to find further that within the meaning of section 13A(3)(a) they have reasonable excuse for not accepting any offer of resettlement in China. Nor can the possibility of their obtaining resettlement in China. Nor can the possibility of their obtaining resettlement elsewhere be dismissed at this stage as altogether negligible."

This passage has been scrutinised in the course of argument before me, and no doubt before that, back and forth, and inside out. I shall have to refer to it again, and will call it 'the first issue passage'. The next following passage in the judgment went thus :

> "The cases of **Haidekker and Bugdacay** raised different issues and include no reasoning that could be decisive of the present case. It is

> to be noted that Mrs Haidekker was expressly found to have been accepted as a refugee in Australia. The interpretation of Part IIIA of the Ordinance adopted in the present judgment and by the HK courts appears to give effect to the purposes of the Statement of Understanding. The document provides that all refugees will have access to resettlement and recognises the special situation of asylum seekers from Vietnam."

The applicants say that the Director has it all wrong; that the first issue passage has been turned into some sort of rigid test whereas it was never posited as a test; and that in any event, it was not the intent of the majority to construct in that passage a test for return to any country; rather it was a list of suggested criteria for deciding whether a claimant had or had not lost refugee status. And in any event it did not, so the argument runs, stipulate that if it were found that the rights had not been denied the applicants, they had no entitlement to be considered for resettlement elsewhere.

I doubt a number of matters concerning the respondent's approach to the first issue passage. First, I doubt that in the penning of that passage it was ever envisaged by their Lordships that it would be placed under the microscope to the extent that it has, or that it was intended to be a directive about questions which had to be asked in this case. Secondly, I doubt that their Lordships were addressing the question which the Director thinks they were addressing. I think that they were addressing, not the question whether the applicants had lost the right to be resettled internationally, as the Director suggests, but whether they were still Convention refugees, even though I do not, with respect, believe that the questions posed could answer that question.

The majority of their Lordships must have been proceeding on the footing that permission to remain as refugees had been refused, or that it was going to be refused, by the Director; and that the matter was then to be considered by the RSRB. The first question to be considered by the Director would have to be whether the applicants were Convention refugees as that is defined by Article 1A of the Convention; in other words, whether they were persons who were unable or unwilling to avail themselves of the protection of

the country of their nationality owing to a well founded fear of persecution. Given the circumstances in which these applicants left Vietnam, and that those circumstances were not in real issue, it was highly likely that the Director would find that the conditions of that particular Article were satisfied. Therefore, the first (real) issue — indeed, as I see it, the only remaining issue as to status — was likely to be whether they had lost their status as refugees because of events subsequent to departure from Vietnam. In the event of any adverse decision, that is, that they had indeed lost their refugee statues by operation of Article 1C of the Convention (e.g. voluntary reacquisition of nationality, or voluntary re-availment of protection of the country of nationality), that then would be a decision which could be the subject of appeal to an examination by the RSRB. That is what was likely to be the first issue on a review. If status was lost by virtue of a provision of the Convention, then the person was no longer a refugee for the purposes of the *Ordinance*. The claims to which the first issue passage refers — denial of their right to work, education and so on, could only be relevant to that loss under the Convention provisions if under Article 1E; in other words if the Privy Council took the view that those rights were rights which "are attached to the possession of the nationality of that country" and that Article 1E was a loss of status provision. Although in my respectful opinion, Article 1E is not a loss of status provision, I nonetheless believe that their Lordships had that in mind in the first issue passage, a view which I believe to be fortified by the fact that it is expressly contemplated that the Board might perhaps 'further' find that there was a reasonable excuse for not accepting an offer of resettlement in China.

In saying that, I am aware that in one of the many affirmations filed by Mr Choy he says :

> "In using S.13A to land ECVII's the Director has found them to be 'refugees from Vietnam in China'. She then found them to be China recognised refugees who have lost entitlement to overseas resettlement because of former protection and resettlement in China who must therefore be returned to China."

I do not think that that means that in no circumstances was an alternative course available; but rather that in the circumstances which emerged, that was the only feasible course to take. Mr Marshall, on behalf of the Director has made it quite clear that were a realistic and ready alternative to present itself, the Director would not, even at this stage, shut his eyes to that alternative.

But the question is whether in the event the Director has misdirected herself as to her obligations; as to the rights of the applicants; and whether she has taken into account irrelevant considerations; or otherwise unlawfully fettered her discretion — and it is on this last basis that the case is put — that by assuming that the Privy Council was saying something which in fact it was not, and acting accordingly, she was fettering her discretion.

If an applicant had in the event lost entitlement to be considered for resettlement other than in China, then there is no relevant error by the Director, and if the Director has read too much into the Privy Council's judgment, that cannot alter the fact — if it is a fact — that the Director's approach was nonetheless, as a matter of law, correct.

The facts found by the Director were in essence these : that the applicants had lived on the Mainland for many years; that they were recognised there as refugees; that they were entitled to reside there; that the authorities on the Mainland would take them back; and that the PRC is a Convention country. It is nowhere contended that by reason of treatment in China they are refugees in relation to China. The minority in the Privy Council was satisfied that on the evidence, "it was plain that China unquestioningly properly resettles former Vietnamese residents returned to China from Hong Kong." The Director made extensive findings both about the treatment of the applicants when they had lived in China, whether their claims to denial of rights were justified, and as to a future durable solution. Assuming for immediate purposes that those findings are not impeachable, I fail to see from whence arises the *obligation* to resettle them elsewhere; or to consider them for resettlement elsewhere.

In my judgment, once the Director is satisfied that resettlement is offered in a third country and that there exists no reasonable excuse for refusing the offer of resettlement, the Director is entitled to return or send the migrant to that country. If that proposition holds goods, there cannot be at the same time an obligation to consider resettlement in a fourth country. The Director may give consideration to such resettlement; and the migrant may advance a case if he wishes. But there can in law be no obligation to consider resettlement elsewhere.

If there were such an obligation, where would it end? Would the Director then be required to consider all countries which were listed by an applicant, await queries from those countries; answer the queries; wait for rejections, and then consider yet further representations by the migrant; whilst all the while the country of first asylum is ready — a convention country perhaps as in the case, in respect of which there is no good reason to question its *bona fides* — to accept the refugee? If, as I am satisfied is the case, there is no obligation upon the Director in such circumstances to consider further avenues of resettlement, it follows also that the migrant then enjoys no entitlement to such consideration; and that is all that paragraph (d) of the determination states. The fact — if it is a fact — that that is not what the Privy Council were saying in the "first issue" passage is then neither here nor there.

V. ISSUES ABOUT PROCEDURE

Procedural fairness

Quite apart from the complaints that the Director has unlawfully deprived the applicants of a right of review to the RSRB; was not entitled to use section 13E in the circumstances in which it was used; and has taken into account irrelevant considerations whilst also failing to consider relevant ones, there are attacks upon the fairness of the procedures adopted by the Director and those other officials engaged upon this entire exercise. There are some

allegations about procedural unfairness which still wait in the wings, in that there is pending an application for substantial amendments to allege bad faith.

Of the five questions which were drawn for my determination at this stage of the application, it is the last three that relate to the question of procedure. As with most of the other questions posed, argument has not always remained within the strict confines of the questions. The grounds of complaint have traversed broader terrain, and inevitably we have strayed into allied grounds of complaint, an event which was inevitable, I think, and not inappropriate in so far as they have at some stage to be addressed.

The argument of the applicants on matters procedural is to the following effect. The Director was obliged to decide whether there was any reasonable ground in the case of each applicant for the implicit refusal to go back to China. The Director was obliged to consider whether Mainland China could properly be called a place of resettlement. If there was cause to believe that the PRC would not comply with its treaty obligations under the Convention towards these refugees, and that they had been poorly treated in the past, then the PRC was not properly to be regarded as a place of resettlement, and there was good excuse for the refusal of the applicants to go back there. In such circumstances a removal order ought not to have been made. In coming to his conclusions about these matters, Mr Choy had relied heavily on evidence in his possession about conditions on the Mainland after the arrival of refugees there from Vietnam, whether they were, as a matter of course, given household registration, from which registration many rights and benefits flowed; what their circumstances were, and whether there was any danger of refoulement to Vietnam. To the extent that this evidence — country condition evidence — conflicted with the stories given by the applicants he assumed, it is said, that the applicants must have fabricated their accounts. He also made findings adverse to their credibility because of disparities between their arrival statements — that is, statements made when, some years ago, they first arrived in Hong Kong — and their screening statements, that is, statements or answers

given by them in the recent screening exercise with which this case is concerned.

The suggestion of procedural unfairness is multifaceted :

1. that country condition evidence upon which the Director intended to, and did, rely was never put to the applicants for their comments, or to enable them to adduce contrary evidence, a failure all the more important it is suggested, because the Director has relied on country condition evidence in assessing credibility disregarding, wholly or largely, the circumstances of individual cases;
2. that the applicants were given no opportunity to review arrival statements, or the statements compiled in the screening interviews, nor to comment upon alleged discrepancies between the two; and they say that fairness required that they should have been given that opportunity, not least because the arrival statements were made for a purpose quite different from that for which the 1997 exercises were designed. There is an allied complaint, which is that the applicants' solicitors were denied sight of the screening interview notes after the interviews had taken place and before the Director made her decision; and
3. that the Director should have permitted the applicants their say after the section 13A decision and before the section 13E decision, advising them at that point that she was considering making an order under section 13E. But she did not, nor did she advise them that it was proposed to conflate the two decisions. The applicants, it is said, were unaware when they were being interviewed that what was in reality at stake was a section 13E removal decision.

The evidence

I have been presented with about 150 pages of affirmations — exhibits excluded — from Mr Choy alone, and they are but a part of those originally placed before me at the interlocutory hearing. Much of that evidence is in the form of legal argument, and it has been a task all to itself to

sift assertions of fact from legal submissions. Then there is a plethora of evidence on behalf of the applicants and their advisers. I think it appropriate to attempt a summary.

Mr Choy deposes to the fact that he has been involved as an immigration officer with the Vietnamese refugee question for many years. In August 1993 he became Assistant Director in charge of the Vietnamese Refugees Branch of the Immigration Department. At the beginning of 1994 he visited Beihai where he says he acquired further expertise about the history of, and current developments concerning, the settlement of those 286,000 refugees from Vietnam who were in China. He was engaged in discussion with Mainland authorities about the return of 'ECVIIs', as they were then called. He accompanied returnees from Hong Kong to the Mainland. He became acquainted with officials from the Ministry of Civil Affairs and other Mainland departments. He has attended conferences in 1996 and 1997 also attended by the UNHCR and regional governments, and he has visited resettlement projects and farms on the Mainland. He says he has specialist knowledge of country conditions relating to these people.

The evidence is that since the resumption of the exercise of sovereignty over Hong Kong by the PRC, levels of co-operation with Mainland officials has increased. In 1994 all 'ECVIIs' in Hong Kong, then numbering 502, were interviewed in Hong Kong by a team of Mainland officials. Those officials informed Mr Choy that there was a problem about verifying the place of registration or settlement on the Mainland in respect of those who had remained in Hong Kong, and that that problem was created by the fact that those who remained were not forthcoming about such details, though the officials were confident that once they were returned and incentive to withhold that information was gone, the correct place of settlement would then reveal itself.

He refers to the amounts of money spent by the Chinese Government upon those who came from Vietnam in the late 1970s; to the

comments and evidence of UNHCR representatives familiar with the problem; evidence which he has about what happened to them after they crossed the border; the deployment of troops and check points.

Several thousand refugees from Vietnam in China (or ECVIIs) came to Hong Kong during the same time span as in the case of these applicants, and by August 1995 only 270 remained; the rest had been returned to the Mainland. That means that Mr Choy has had the opportunity to ascertain and monitor what has happened to those who have returned.

The importance of household registration is manifest from the following evidence of Mr Choy :

> "Household registration in China applies to all citizens and residents and one of its main objectives is to prevent mass movement from country to city and from poorer areas to development areas..... [It] is the key to registration of births and marriages. With household registration goes also the issue of identity cards which in turn provide official freedom of movement. With household registration goes access to education, access to public health services and access to gainful employment."

He then contends that :

> "the refugees from Vietnam who were settled had household registration or entitlement to it. Consequently they were treated in the same way as Chinese citizens except for the right to participate in elections."

He asserts that the system of registration was a very strict system and views with great scepticism claims that people escaped the net. However the lure of moving to areas more economically attractive meant that there were those who moved, even though that had not managed to transfer their household registration to the place to which they were moving. The proportion of China's population as a whole that floated in this way is said to have been very large.

It is said that the household registration system is now not as tight as once it was, and that those, in certain areas at least, who have employment may obtain a work permit even though without household registration in that place, but may not apply for government jobs or work in state owned enterprises. The applicants say that they have not been registered and that the evidence of registration and the tightness of the system is much exaggerated.

Mr Choy avers to his belief that as a general rule those ethnic Chinese who fled from Vietnam to China were registered. Nonetheless he says that he has considered each case individually. He contends that if he were to find that someone had slipped through the net, he would not hesitate to find that that person is not at this stage a refugee recognised and protected in China as such; in which case he would consider that person entitled to resettlement overseas and be allowed to stay in Hong Kong pending such resettlement. Nor he says has he taken "any proposition based on country conditions as pre-determinative of all individual decisions. What I have done with country conditions evidence is to use it where it is appropriate to evaluate aspects of claims made in order to assess whether the facts alleged are credible."

He asserts that country condition evidence is a valid tool by which to test the credibility of an applicant's contentions.

None of the applicants has been naturalised as a Chinese citizen. I do not know whether any has applied. But, according to the evidence, naturalisation will be available to those who want it, once there is resolved between the central government and the Vietnamese authorities the question of return to Vietnam of those who might wish to return. The evidence is that the Vietnamese will not take back those settled as refugees in China. Prospective returnees are reluctant to commit themselves to return without knowing whether in Vietnam they will be accorded household registration. The central government's intention is that those who wish to return to Vietnam

should do so after an agreement with Vietnam, and that those who thereafter choose to remain in China will be granted Chinese citizenship.

In March 1995, Mainland authorities accepted that all remaining ECVIIs in Hong Kong were Indo-Chinese refugees from Vietnam who had resettled on the Mainland. They have recently confirmed their willingness to take them back and to resettle them and protect them from refoulement. This applies even to those, if there are any, who slipped the net of household registration. Mr Choy affirms that the Director of Immigration as well as the Security Bureau accept that the Mainland " … will act as it has declared it will." It is said that the UNHCR continues to be involved in the resettlement process, and the evidence is to the effect that if returned, their return will be monitored by the UNHCR.

Mr Choy finds that the central government has taken its Convention obligations seriously, and says that that is the view shared by UNHCR officials. The evidence is that the UNHCR has monitored returns of ECVIIs from Japan, Australia and Hong Kong. He says that the view that refugees would have evaded or have been missed by the web of Chinese authority is generally speaking not believable. So too he says it is unbelievable that the Chinese authorities refouled refugees who had been settled. He also addresses in detail the problems which those who have doubled back to Hong Kong say that they encountered upon their return to the Mainland.

There is placed before me evidence which Mr Choy had before him, namely, the evidence of the UNHCR given to the Australian Senate in February 1995, which details the extent of UNHCR involvement and monitoring by the UNHCR in China of the resettlement of Indo-Chinese refugees in the Mainland. It describes the programme instigated by the Chinese authorities for the absorption of these people, and it concludes that 'as a group these people have been properly taken care of by the Chinese. The Chinese have lived up to their responsibilities under the Convention.'

Monitoring has included monitoring those who have left China and have been returned. As for household registration, he (the representative) says that "we can start with the assumption that the overwhelming majority of this caseload were registered at some point."

The evidence filed by the applicants is to the following effect :

1. That many ethnic Chinese who fled Vietnam were not resettled as refugees in China, and there is evidence given to the Australian Senate by an organisation called 'Coalition for Asylum Seekers,' who said that such people were not given the same rights as Chinese nationals. The allegation is made that the country conditions to which Mr Choy refers relates to those accepted as refugees but it is said that the applicants were not settled as refugees. They were merely illegal residents, a status not of their choosing.
2. That the applicants were not protected from refoulement. They were regarded as illegal immigrants liable to expulsion especially in the case of those who did not have, or could not prove, household registration. It is said that the risk of refoulement is a remaining risk.
3. That those applicants who were sent back to China were not in fact resettled. They were not, even then, given household registration. They were just given nominal sums of money and sent on their way.
4. That those recognised as refugees have not been given naturalisation, a breach it is said of Article 34 of the Convention.
5. That those who resided on the Mainland were not there accorded the rights accorded Chinese nationals; and were not granted minimum rights to which they were entitled under the Convention. The contention is that there is no reason now to suppose that their treatment will improve upon their return, so that their refusal to go back is eminently reasonable.

The Procedure Adopted

Each applicant was interviewed by an immigration officer, with an interpreter present. The respondent says that after the interviews, what had been said by an interviewee was read back. It is asserted that previous inconsistencies were put to applicants for their comments. It is also argued that the applicants were fully aware of the issues at stake. Interview notes were placed by the immigration officer before a senior immigration officer, with a summary and recommendations. Arrival statements and other material were attached. The Senior Immigration officer passed the papers to the Chief Immigration Officer with his comments, and the interview notes, and the Chief Immigration Officer's recommendations were passed to Mr Choy. Mr Choy says that he considered each case, did not always agree with comments, but he endorsed the conclusion reached in each case. All of the officers concerned were trained in country conditions in China relating to the reception and settlement of refugees from Vietnam in 1978 and since.

I have had placed before me some of the completed interview forms used in the course of the screening process. The notes made on those which I have seen are detailed, and the forms have clearly been carefully devised to cater especially for the particular problem of these people from Vietnam who have lived in China. They include also space for information about overseas relatives and connections.

Law

Those within government departments who are charged with the making of administrative decisions make those decisions against a backdrop of multifaceted policy considerations, historical information, contact with other departments and outside agencies, and first hand experience of a particular issue or problem; considerations, information, contact, and experience which the courts do not possess, and the officials are entrusted by the legislature to make such decisions. So unless it be shown that the administrators have acted beyond the powers conferred by law the courts have no right to intervene.

The court does not place itself behind the desk of the decision maker to ascertain whether the court would have arrived at the same conclusion.

But when it comes to the decision making process a court is entitled to judge whether the decision making process was fair. That is not to say that perfection is required, or indeed that it suffices for an applicant to show that something more fair might have been devised :

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in an manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weight against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.
>
> My Lords, the Secretary of State properly accepts that whatever the position may have been in the past these principles apply in their generality to prisoners, including persons serving life sentences for murder, although their particular situation and the particular statutory regime under which they are detained may require the principles to be applied in a special way. Conversely the respondents acknowledge that it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made."

(per Lord Mustill in **R v Home Secretary Ex p Doody** 1994 1AC 531 at 560 and 561).

I have been referred to judgments of the High Court of Australia in **Kioa v West** (1985) 159CLR 550. There, Mason J (as he then was) traced the shift from the traditional reference to the rules of 'natural justice,' — more apposite to judicial or quasi judicial proceedings — to the more appropriate reference now used, namely, that of a duty to act fairly or to accord procedural fairness :

> "The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decision which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. It seems that as early as 1911 Lord Loreburn LC understood that this was the law when he spoke of the obligation to 'fairly listen to both sides' being a duty lying upon everyone who decides anything': *Board of Education v Rice.*"
>
> "… What is appropriate in terms of natural justice depends on the circumstances of the case and they will include inter alia the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting.
>
> In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations: cf. *Salemi* [No.2], per Jacobs J.
>
> When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is : what does the duty to act fairly require in the circumstances of the particular case? …"

(see **Kiao** at pages 584 and 585).

In the quest for the answer to that question in this case, I have had the advantage of sample cases placed before me, by which I mean the cases of several of the applicants; Mr Choy's conclusions; his analysis of the accounts given, of the arrival and screening statements, of the country condition evidence which he has applied; and the affirmations of several of the applicants and their advisers in which they deal with what it is they might or would have said had they been given an opportunity to do so. The case of the applicant Nghiem Kiet is but one example. He arrived in 1991 in Hong Kong. He made a written statement then signed by himself above a declaration that it was true and that he knew he could add to or alter it. Mr Choy has inferred from that statement that that applicant was thereby giving an account of having been settled near the border with Vietnam , in Gaunxi Province, after he and his grandmother had fled in 1978. His later statements assert that he was never settled and that he and his grandmother lived a furtive existence for years on end, hiding and resorting to bribery of officials. Mr Choy's explanation of his conclusions is subject to attack in several affirmations filed by that applicant, suggesting in particular that statements attributed to him in the arrival statement were not made by him; that the inconsistencies suggested are not in fact inconsistencies; and that country condition evidence upon which Mr Choy has relied is inaccurate.

Unless it be shown that Mr Choy has not in fact approached the analysis of this and similar cases in the manner he describes, or that he or his officers have acted in bad faith — and it is intended by the applicants to pursue that allegation, if leave to amend is granted — then it seems to me that the procedure adopted and his approach is not shown to be lacking in due rationality or to be in any way unfair.

In the case of Nghiem Kiet, Mr Choy has taken into account a host of considerations : evidence before him from which he was entitled to infer that on arrival the applicant was providing a story which strongly suggested settlement in China in 1978 or thereabouts, near the border with Vietnam, and from which, when taken together with his knowledge of what happened to

ethnic Chinese who crossed the border in that location at that time, he was entitled to conclude that the applicant and his grandmother had then been resettled. He places this against those facts in the screening statement which he views as inconsistent, and then goes on to find that Mr Nghiem Kiet has been recognised as a refugee, granted a durable solution and granted protection, and he states that China will accept him back, where he will be accorded as durable solution. There is also evidence that in the course of screening interviews, inconsistencies were put.

What all this then amounts to, if true, is that Mr Choy, a senior immigration official has based his decisions in each case upon a number of considerations and against a complex tapestry, which includes his accumulated knowledge of the history of flight from Vietnam to China, the reception of those who fled, their treatment after 1979, extensive contacts with officials, his own visits to the Mainland, talks with refugees; contacts with the UNHCR about this self same problem; literature available to him; evidence given to the Australian Senate; a conclusion that as a general rule — allowing of some, though few, exceptions — escaping the registration net for years on end, as these applicants suggest, was unlikely; written arrival statements signed by each applicant and taken by trained officers upon whose integrity he was entitled to rely; and extensive interviews recorded in writing with each applicant upon screening, in respect of whom it is said inconsistencies were put then and there.

To require in these circumstances that before moving to his conclusions the Director ought to have rehearsed his reasoning for the benefit of the applicants prior to his decision would, in my judgment, be to craft a counsel of perfection which would border upon artificiality.

Country conditions

It does not need the promulgation of Conclusion 58 — with its reference to the growing problem of irregular movement and

misrepresentations by asylum seekers — to bring home the importance of an objective credibility test in cases such as the present, an importance emphasised by paragraphs 41 and 42 of the Handbook on Procedures and Criteria for Determining Refugee Status, issued in 1979 by the Office of the UNHCR :

> " Due to the importance that the definition [of 'refugee'] attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences — in other words, everything that may serve to indicate that the predominant motive for his application is fear. …..
>
> As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin — while not a primary objective — is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."

Any machine established to ensure effective immigration control will develop, in conjunction with other government departments and agencies, a wealth of information by which can be tested the veracity of claims made by would be immigrants and visitors. Each immigration official will have, to some extent or another, such information available to him, to which he will add such experience as he himself gains during the years of his service. The assessment of the credibility of statements made by those who apply for visas, entry permits, residence status, refugee status, identity cards, change of conditions of stay, lies at the very core of the immigration officer's job. And in exercising that core function he brings to bear upon that assessment facts which he can assume to be safe; facts well established by years of official information gathering; by requests for information from officials of other

countries, from the United Nations, and from reports of immigration and other government officials of the recipient country who have themselves had occasion to acquire some expertise on the subject. Country condition information falls within this category. It is not information personal to the traveller; or to the refugee. It is information of general application, which by reason of its provenance, the fact of its collection by government departments from sources which the authorities consider to be reliable, and the acquisition of specialist knowledge by an individual officer, is a valid basis against which to test contentions of migrants, so long as the information is properly applied to the circumstances of a particular case. It is information to be distinguished from information about or relating to an individual applicant, which is personal to an applicant. Information which is personal to a migrant and his circumstances is most unlikely to have been gathered in the same way; and information personal to him or her is, by definition, information which he or she is best placed to confirm or contest, or qualify.

Kiao, to which I have made earlier reference is a case readily distinguishable on its facts from the present case, not least because it related to temporary residents who had overstayed and were, accordingly, prohibited or illegal immigrants. A court's expectation of procedural benefits is likely to be greater in the case of those lawfully in a territory, (as are these applicants once permitted to remain as refugees), than in the case of those who remain unlawfully. Nonetheless, in the judgment of Mason J (as he then was) at pages 586 and 587, there emerges this distinction between the opportunity to respond in respect of information personal to an applicant, and information which is not :

> " But what does procedural fairness entail in its application to the exercise of the discretionary power conferred by s.18? It would be going too far to say that fairness requires that in all cases in which a deportation order is to be made notice should be given to the prohibited immigrant of the intention to make such an order and of the grounds upon which it is to be made. The *Migration Act* plainly contemplates that in the ordinary course of events a deportation order will be made ex parte. And the prohibited immigrant may be a person who, intent upon remaining in Australia without lawful right or

title, has evaded the authorities and will continue to do so. He may even be a person who has been required under s.31A to leave, but has declined to do so. To insist that he be notified of the intention to make a deportation order would serve only to facilitate evasion and frustrate the objects of the statute. These considerations indicate that, in the case where the reason for the making of the order is that the person concerned is a prohibited immigrant, the dictates of natural justice and fairness do not require the giving of any advance notice of the proposed making of the order: *Salemi* [No.2], and *Ratu.*

But it may be otherwise where the reasons for the making of the order travel beyond the fact that the person concerned is a prohibited immigrant and those reasons are personal to him, as, e.g., where they relate to his conduct, health, or associations. And if the order is made in consequence of a refusal to grant a further entry permit to him, the reasons on which that refusal is based may require that as a matter of fairness the person affected should have the chance of responding to them.

However, this is not to say that fairness will necessarily, or even generally, require that an applicant for a further entry permit be given an opportunity to be heard even where deportation may follow from its refusal. The grant of an entry permit is a matter of discretion. Indeed, the cancellation of a temporary entry permit is expressed to be a matter of absolute discretion: s.7(1). In the ordinary course of granting or refusing entry permits there is no occasion for the principles of natural justice to be called into play. The applicant is entitled to support his application by such information and material as he thinks appropriate and he cannot complain if the authorities reject his application because they do not accept, without further notice to him, what he puts forward. But if in fact the decision-maker intends to reject the application by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter : *In re H.K. (An Infant).*"

The point there made was echoed by the Federal Court of Australia in **Sinnathamby & Others v Minister for Immigration & Ethnic Affairs** (1986) 66 ALR 501, page 506 :

"… There is, for example, no general requirement that an applicant be informed of the sources of all the information which the Department receives concerning his or her case, or the content of that information. As a general rule, when some consideration personal to the applicant is to be taken into account against him or her the rules of natural

> justice require that the applicant be given a chance to comment or contradict: see *Kiao,* per Mason J at p 348."

None of this is to say that there will not be cases where an item of evidence not personal to an applicant but nonetheless affecting the decision, evidence obtained from an objective and reliable source, need not be disclosed to an affected party. But in my judgment it was not required in this case.

The range of country condition evidence was very wide indeed, as were the sources. None of it was personal to the applicants or to any of them. The sources to which the Director resorted were not just those proffered by the authorities of the countries against which the applicants had a grievance, and suggested were unreliable. The information was from the UNHCR; from evidence given in Australia and from the personal expertise developed by Mr Choy himself. The Respondent's list in the **Nguyen Tuan Cuong** proceedings included the proceedings before the Australian Senate, so that the applicants' solicitors were aware of the UNHCR stand that one "could start with the assumption that the overwhelming majority of this caseload were registered at some point ."

Indeed in evidence filed for the purposes of this application those acting for the applicants, who are solicitors very well versed in refugee matters, and have acted for the applicants throughout the time during which interviews were conducted, have referred to the fact that evidence was presented by the applicants before the Privy Council of the distinction to be made between refugees settled in China and those from Vietnam whose presence was merely tolerated. That is a reference to testimony given by non-governmental refugee associations before the Australian Senate, evidence Mr Choy had before he made his decision. So that point and the distinction and the importance of it was one of which the applicants were well aware considerably before the screening exercise, and was a distinction which they knew was or had been before Mr Choy. Furthermore, country condition information upon which the respondent relied in relation to double backers, or a summary of it, was

presented in writing to those acting for the applicants in correspondence in July 1996. Nor is it to be forgotten that central to the Director's decision to order their removal was the question about what was to happen to these applicants in the future if they were returned to China. The issue whether they had or had not been registered in the past was not, in other words, the be all and end all of the matter, for there was an undertaking by the Mainland authorities that they would accept all these applicants back, and that upon their return they would be granted household registration. Against the backdrop of these considerations, I unfairness.

The non-provision of previous statements

The fourth question which I have undertaken to tackle is this :

> "Was the Director of Immigration — whether by Mr Choy or through other immigration officers — required to provide the Applicants with copies of previous statements made by them (whether made upon arrival or later) which were used in the decision making process by the Director, so as to enable the applicants to comment upon them, or to make such corrections as they proposed ?"

The applicants' discontent here results from the use by Mr Choy, in arriving at his decisions, of suggested disparities between arrival statements and screening statements, without first providing the individual applicant with copies of earlier statements to enable him or her to comment upon or correct them; an omission which is said to be demonstrably unfair when it is remembered that the earlier statements were made in the course of a different exercise and many years ago. It was also unfair, they say, to deny their solicitors' request for copies of interview notes made during the screening exercise, before a decision was made by the Director — a facility formerly accorded to those, and other, solicitors in refugee screening exercises.

The response by the respondent to the latter complaint was that the previous practice was a facility not offered to applicants for refugee status as a

whole, but only to those who happened to be represented by solicitors and was a legacy of a period before 'readback' became general practice.

Question 4 is perhaps too broad. Procedural fairness does not come in packages graded for use according to category of administrative function. What is fair or not fair depends on the facts of the individual case. Nonetheless there is an extensive history to these proceedings and behind the interviewing process, which is common to all applicants, and I have in addition a considerable body of information in this application about the procedures used, so that I think it feasible to answer the particular question which is posed.

It is hardly unknown in immigration cases that some migrants will, with the passage of time, put forward inconsistent or increasingly inflated accounts. So long as the interviews are fairly conducted, enabling the interviewee fully to put his story, and the answers accurately recorded, there is no general rule that material inconsistencies have to be put at all before they might be used by a Director of Immigration, or by a Secretary of State, as a test of credibility. (see for example, **R v Secretary of State of the Home Department ex parte K** [1990] Imm AR 393; and **R v Secretary of State for the Home Department ex p H Bolart** [1991] Imm AR 117). I am told however that in the 10 cases deployed in these proceedings by the applicants as sample cases of procedures used, previous suggested inconsistencies were put to them in the course of the interviews — that at any rate is the evidence of the respondent, and may very well not be accepted by the applicants concerned.

The unusual feature of the screening interviews in this case is that they were conducted after the applicants' plight had been the subject of prolonged litigation, and after the Privy Council had spelt out the issues or the key issues to which the interviewing exercise was directed. Although the applicants were not, as far as I am aware, represented when they first landed in Hong Kong and made their arrival statements, they were represented throughout the **Nguyen Tuan Cuong** proceedings, and since, by solicitors who were steeped in the case, and are experts in the immigration laws of Hong

Kong and their implementation in relation to asylum seekers. There can in my view have been no doubt in the mind of any applicant but that the subject matter of the screening interview was to be his or her contention that he or she had never been settled or resettled on the Mainland, had not been given household registration, and had not been accorded certain rights on the Mainland; or that in the course of the interviews searching questions would be asked to test the credibility of their accounts; and that credibility was to be a main item on the agenda. In so far as there may be some suggestion that there should have been advance warning of the intention to examine earlier statements as a guide to credibility, it is a suggestion which, with respect, ignores the obvious requirement to conduct a test of credibility which is meaningful, and it ignores reality too, namely, that no-one versed in immigration procedures, as were the applicants' solicitors, would expect anything else.

Where determination of credibility is the cornerstone of an exercise, the examiner must be permitted to have at his disposal a mechanism to test it which is fair to the interviewee, certainly — but which is also effective. And the fact is that if there emerges in the course of the interview a statement by the interviewee which is at odds on a material point with an earlier statement, or an assertion which one might have expected to have been made at an early stage but which was not, a procedure which invites the interviewee to go away and make representations a couple of weeks later about the disparity, or about the omission, is, in reality and as a general rule, unlikely to be an effective barometer of the truth. And, similarly, if the arrival statement is sent to the applicant in advance of the interview "to comment or make such corrections as they propose", that too may prove less helpful to the credibility test, particularly if the interviewee knows in advance what the factual issue at interview is to be, than would an immediate reaction to a question posed at the interview itself. Much the same sentiment is expressed in **Director of Immigration & Another v Le Tu Phuong & Another** [1994] 2 HKLR p.212-223 by Litton JA (as he then was), albeit in relation to a different factual context.

Whether there were disparities and whether it can be shown that an obviously wrong conclusion was drawn from them in a particular case is another point. But I am quite satisfied that unless it can clearly be demonstrated in an individual case to have been necessary or warranted, there was in my judgment no general obligation in these cases to provide the applicants with copies of earlier statements to enable the applicants either in advance of the interviews or after them, to make comments or corrections. The interview notes I have seen evidence lengthy and thorough interviews, and in fact inconsistencies or omission put at interview. That is enough in my judgment, and there was no need then to go further, or to notify the solicitors that the Director intended to rely on previous statements as relevant to credibility, or to send them interview notes before the Director made her decision. In other words, the answer to Question 4 is, in my judgment, 'No'.

The Fifth Question : Section 13E and prior notice

The fifth question posed is this :

> "Was the Director obliged to notify the applicants of her proposed decision to make removal orders under section 13E(1) *Immigration Ordinance, Cap.115* and state the grounds, and provide documents relied upon, for making that decision so as to provide the applicants with an opportunity to make representations against the making of the order?"

The Notices of Determination evidenced two distinct decisions — the decision under section 13A that the applicants be classified as refugees and permitted to remain in Hong Kong pending resettlement, and the decision under section 13E to remove them to the Mainland. It is common ground that there was no gap between notification of the two decisions. The procedure was conflated in the sense that the screening interviews were directed at both issues.

Mr Dykes, S.C., on behalf of the applicants, insists that the procedure adopted was unfair, or rather that the facilities not offered to the

applicants constituted procedural unfairness. He urges me to conclude that procedural fairness required that the applicants be heard after the first decision and before the second, not least because the legislation enabled two different categories of official to make the two decisions — an immigration officer under section 13A, and the Director under section 13E, meaning in the latter instance any member of the Immigration Service of the rank of senior principal immigration officer or above. The applicants, it is said, were entitled to address the actual decision maker, and he — Mr Choy in this case — should at least have notified the applicants of the decision he was minded to make under section 13E, the recommendations which had been advanced by immigration officers, and the grounds upon which he intended to decide against the applicants. In the event, the argument runs, the decision maker under section 13E has given ear to one source of information — the immigration officers — but not to the other important source, namely, the applicants.

In this regard I am taken to **Kanda v Government of Malaysia** [1962] AC 322, where Lord Denning at page 337 said :

> " If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him : and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in *Board of Education v. Rice* [1911] A.C. 179,182; 27 T.L.R. 378, H.L. down to the decision of their Lordships' Board in *Ceylon University v. Fernando* [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631, P.C. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other."

The principle holds good for this case, but the facts upon which **Kanda** turned can readily be distinguished. In **Kanda** an adjudicating officer made recommendations to the Police Commissioner for the dismissal of a police inspector. The Commissioner approved the recommendation and, on his direction, the inspector was dismissed. But the adjudicating officer had before him a report, personally adverse to the inspector, which had not been

disclosed to the officer then at risk of dismissal. The more appropriate analogy in the case which is now before me would arise had the interviewing officers had in their possession adverse information relating to the person of an applicant which had not been put to that applicant.

From **Kanda**, I was drawn to **In re H.K.** [1967] 2 QB 617, where it was said that an immigration officer had failed to give to an immigrant an opportunity of removing an impression from the mind of the officer that the immigrant was over an age which would disentitle him to remain in the United Kingdom, and evidence was placed before the court, which it was said would have relieved the officer of his misgivings. So, too, Mr Dykes claims, would the applicants have placed evidence before Mr Choy, which would or might satisfactorily have answered such question marks as had been raised about the credibility of the applicants. On the facts of the case cited, the complaint did not succeed because :

> " It is impossible to believe other than that both father and son knew full well of what they had to satisfy the authorities. They were, as it seems to me, given ample opportunity to do so." (per Lord Parker C.J., at p.631).

I shall shortly turn to that very issue, namely, whether in this case the applicants knew full well of what they had to satisfy the authorities, and whether they were given ample opportunity to do so.

The applicants also pray in aid the decision in **R v Secretary of State for the Home Department ex parte Fayed and Another** [1997] 1 All ER 228, where the Court of Appeal in England quashed the decision of the Home Secretary, because he had failed to provide to the applicants for naturalisation information about the subject matter of his concern; concern which led him to refuse the application. It is to be noted, however, that in that case :

> "…neither of the [applicants had] ever been informed what were the aspects of the applications which have given rise to difficulties or reservations about their applications." (per Lord Woolf MR at p.232).

In other words, they simply had no idea as to those matters about which they needed to satisfy the authorities.

I do not know whether section 13E has been used by the Director other than in this case or, if it has been used, in what circumstances. One suspects that when framed and enacted, what was visualised was the emergence of some adverse fact or consideration well after a favourable section 13A decision. In such circumstances, conflation of the inquiry processes or of decision making would not arise, and one would then normally expect the grounds for removal to be put, in a separate exercise, to the refugee who has previously been landed under section 13A. Looked at in that light, and removed from the facts of this case, the applicants proposed answer to Question 5 (which is that the Director must of course notify the applicants of the proposed decision under section 13E) would appear to be well grounded.

But the answer cannot be wrenched from the facts of this case, and the procedural history of this case demonstrates to my satisfaction that, although they were not told in terms that the interviewing exercise had section 13E well in mind, they knew full well that the questions they were asked and to which they were giving answers, the matters about which they had to satisfy the authorities, were matters which went directly and fully to the question whether there was reasonable excuse not to go back to the Mainland, and that if there was not, they were liable to be returned by the Director in the exercise of her power to order their return under section 13E of the *Ordinance*. It is a point which was made by the applicants themselves in the case presented on their behalf in the Privy Council :

> " The evidence about their treatment in China will be the evidence which, if accepted, should satisfy the Director of Immigration that Article 1E of the Convention does not apply. It should also satisfy the Director that it would be reasonable for them to refuse an offer of

> resettlement in that country if one were made to them." (see paragraph 83 of the Appellant's Case).

The risk of the Director invoking section 13E upon a favourable determination under section 13A must also have been appreciated by those representing the applicants. It was referred to by Mortimer JA (as he then was) in **Nguyen Tuan Cuong**, at page 83 :

> "…even if an applicant is afforded refugee status, it seems to me that the Director's powers under s.13E are wide enough for him to order the removal of that person without delay now that China has agreed to accept him back," (emphasis added)

— a passage to which the applicants' Case in the Privy Council referred, arguing however that the exercise of that power in that way was not inevitable because the applicants had a reasonable excuse to challenge removal, and that that reasonable excuse was that they had been poorly treated, that their rights had not been and would not be respected, and that they feared persecution in China. It was said that it would be "**Wednesbury** unreasonable for the Director to invoke section 13E to remove them to China".

The questionnaire designed for the screening exercise and the questions asked were directed at the history of the applicants in China since their flight from Vietnam, their economic and social rights in China, why they left China, and why they did not wish to return. They knew what the issues were. They knew of what they had to satisfy the authorities. The questions they were asked were, as they must have known, directly relevant to the issue whether their refusal to return to the Mainland was reasonable, and it was to that question that their answers were directed.

I am satisfied in the circumstances that fairness did not require a separate section 13E exercise; or that the applicants or their advisers be told in terms that the questions were or were also directed to that end; or that the Director notify them of her proposed decision to order their removal.

The suggestion is advanced that the applicants ought to have been given an opportunity of addressing Mr Choy since he was the decision maker. I fail to see how in reality the applicants were disadvantaged. It was not necessary for Mr Choy himself to interview the applicants. The officers who did interview them were trained especially for this exercise. The questionnaires which they were to use were designed specifically for it. The chain of command, and the system by which interviewing officers report up the line with recommendations is the same as we see discussed in **Director of Immigration v Le Tu Phong** [1994] 2 HKLR 212, and that which is common, sensible and practicable in immigration settings. Added to which is the testimony of Mr Choy that he did not rubber stamp recommendations, but himself actively considered the merits of each case.

It will always be possible to cull from the detail of any procedure adopted, especially from a prolonged exercise with a history such as that to be found in this case, steps that were not taken, opportunities that were not offered, considerations that were not expressly put, and to postulate one or a host of propositions which begin : “If only…”. Yet from beginning to end, the question which faces the court always remains the same : “Was the procedure adopted a fair procedure?” — and if an applicant knew full well what the issue was, and was given in respect of that issue a full opportunity to make his case, then a court is likely to find that the applicant was treated fairly, and is likely to look askance at submissions which seek to take the court away from the question of simple fairness to a question of perfection, or which invites the court to encourage that which Lord Wilberforce in **Wiseman v Borneman** [1971] AC 297, 320 labelled “an infinite process of contestation”.

On the evidence which is thus far before me I conclude that, whilst it is possible to say that the applicants might have been afforded further opportunities to make representations, they were nonetheless treated with procedural fairness. That is not to forestall any arguments that might arise on the question of bad faith or predisposition. The conclusion which I reach and

which is reached, as I say, on the evidence thus far before me, is that the answer to Question 5 is 'No'.

VI. CONCLUSIONS

The answers therefore to the questions posed are as follows :

1. (1) The Director, having determined in an exercise conducted under section 13A of the *Immigration Ordinance* 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.

   (2) 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 section 13A, to make a removal order under section 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**, 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 section 13E, or to state the grounds upon which she proposed to make her decision, or to provide documents relied upon.

I believe that the issues which are resolved by this judgment dispose of those which are raised by the application for judicial review save for the allegation that the Director was predisposed to determine the case against the applicants, and save for those matters which the applicants wish to raise by way of amendment to the existing grounds. I shall, on a date to be fixed, hear counsel further, when they may invite me to such issues, if any, as they believe remain to be addressed, and advance argument on the application to amend, and such other outstanding applications as it is intended to pursue.

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

Mr William Marshall, S.C., and Miss Joyce Chan, of the Department of Justice, for the Respondent

Mr Philip Dykes, S.C., and Mr Matthew Chong, inst'd by M/s Pam Baker & Co, for the Applicants