IN THE COURT OF APPEAL

1995, No. 196
(Civil)

BETWEEN

NGUYEN TUAN CUONG and 227 others	Appellants
and	
DIRECTOR OF IMMIGRATION SECRETARY FOR SECURITY CHAIRMAN OF THE REFUGEE STATUS REVIEW BOARD	Respondents

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Coram: Bokhary, Mortimer & Mayo, JJA

Date of Hearing: January 11, 12 & 17, 1996

Handing down of Judgment: February 8, 1996

J U D G M E NT

Bokhary JA:

INTRODUCTION

This case, like so many to do with immigration, is a sad one. It comes to us as an appeal by 228 unsuccessful applicants in judicial review proceedings. In the court below, Sears J spoke of 229 applicants. But we are told that that was a miscount. Anyway, all the applicants failed before Sears J. He dismissed their applications on September 1 last year. And they now appeal to this Court.

BACKGROUND

A word has to be said about the general background.

For a long time, the constant flow into Hong Kong of "illegal immigrants" from China has been a well-known feature of local affairs. So too has the arrival here of wave after wave of Vietnamese "boat people".

In the present case, we are concerned with persons whom the authorities here have classified as "ECVIIs", which stands for "Ex-China Vietnamese Illegal Immigrants". The classification is not laid down in any statute. It is purely administrative.

All the appellants are adults who have been so classified or children whose parents have been so classified.

They are all ethnic Chinese. In the past, the adults had made their home in Vietnam. But about 20 years ago, relations between China and Vietnam so deteriorated that they, along with many other ethnic Chinese residents of Vietnam, came to fear what might happen to them if they, being ethnic Chinese, were to remain in Vietnam. So they fled to China.

Some 287,000 persons, the adult appellants among them, so fled Vietnam for China. There is a dispute as to how they fared in China. The vast majority of them at least seem to have properly resettled in China.

However, some 23,000 of them including the appellants have come from China to Hong Kong, all arriving here without travel documents.

Ignoring a visit which one of the appellants made to Vietnam in 1994 and the special position of another appellant (who left Vietnam for China in 1974, returned from China to Vietnam in 1988 and then came to Hong Kong from Vietnam in 1991) the first of the appellants to leave Vietnam for China did so in 1978, while the last of them to do so did so in 1983. Most of them left Vietnam for China in 1978 and 1979.

The first of the appellants to arrive in Hong Kong from China did so in 1990, while the last of them to do so did so in 1994. Most of them arrived in Hong Kong from China in 1993.

By the time the idea of seeking judicial review was conceived, all but some 300 of those some 23,000 persons had been returned to China.

An application was made in the names of those some 300 persons for leave to apply for judicial review. Of them, the 228 appellants were granted leave. The others were refused leave.

In the Notice of Application for Leave to Apply for Judicial Review, the persons seeking leave were divided into "five broad groups in terms of their place of residence or detention". When one looks at how

those groups are described in that Notice of Application, one sees that the descriptions go beyond mere place of residence or detention. Those descriptions are worth quoting.

First, Applicants 1 to 31 were put in the "first group", which the Notice of Application says:

> "is made up of those who are detained in a small, segregated area of Section 5, Whitehead Detention Centre. They were classified as ECVlls and have not been screened for refugee status. Some lived in China for more than a decade before fleeing to Hong Kong. Others alternated between China and Vietnam before fleeing to Hong Kong."

Secondly, Applicants 32 to 224 were put in the "second and largest group", which the Notice of Application says:

> "is made up of those Applicants detained at Chimawan Detention Centre. Most, but not all, of these Applicants arrived in Hong Kong in 1993 having fled from Beihai in Guangxi Province after their make-shift homes were destroyed by the authorities, reportedly to clear the way for development. Many of the Applicants in this group state that the authorities responsible for destroying their homes told them that they did not belong in China and should leave. Upon arrival in Hong Kong, they were classified as ECVlls and denied screening for refugee status."

Thirdly, Applicants 265 to 314 were put in the "third group", which the Notice of Application says:

> "is made us of Applicants who were released in November or December 1994 to Pillar Point Refugee Centre, an "open" camp on the outskirts of Tuen Mun in the New Territories. Here, they are free to come and go as they please, and to work in the community. Most of these people were once classified as ECVlls, then reclassified as VMs and screened for refugee status. They were screened out as non-refugees, however the issue as to whether they retained their refugee status from Vietnam was not considered by the decision makers. For the most part these Applicants were permitted to apply for voluntary return to Vietnam and were refused by Vietnamese officials on the basis that they had fled to China prior to the introduction of screening for refugee status on 16 June 1988. Vietnamese authorities apparently consider that ethnic Chinese persons who fled

> Vietnam prior to 16 June 1988 are not Vietnamese nationals and their return will not, as a general rule, be permitted."

Fourthly, Applicants 225 to 264B were put in the "fourth group", which the Notice of Application says:

> "is made up of persons classified as ECVlls who were removed to China on 24 June 1995. They arrived in Hong Kong in 1993 or 1994, were denied access to screening for refugee status, and summarily removed to China. While generally interested in all aspects of this action, these Applicants can probably only benefit directly from an award of damages against the administration for their illegal detention or other damages suffered."

And fifthly, Applicants 315 to 319 were put in the "fifth group", which the Notice of Application says:

> "are those who remain in detention after having unsuccessfully applied for voluntary repatriation to Vietnam. One such Applicant applied to return to Vietnam voluntarily in 1990, never withdrew that application, and has remained in detention since."

Those in the first, second and fifth groups were granted leave to apply for judicial review, and are the appellants. But those in the third and fourth groups were refused leave to apply for judicial review, and fell out of the picture accordingly long ago.

Having to deal with 228 persons seeking relief rather than one or a selection in a test case has made our task much more difficult. But we have done our best in the circumstances. That involved our making many requests for information, which counsel did their best to agree on and supply. Information and corrections of information earlier given kept coming in right up to the end of the hearing.

Of the 228 appellants, 201 seek judicial review and/or damages, while 27 seek damages only. The 27 who seek damages only are made up of the five who make up the fifth group plus another 22 persons. Of those 22 persons, two are from the first group while 20 are from the second group. All 22 had been removed to China before leave to apply for judicial review had been granted by the High Court. And they were granted such leave without that court, the other side or even their own legal advisers being aware that they had already been removed to China. It is not clear how such a state of affairs came about. Nobody suggests bad faith on anybody's part.

CHALLENGE FORMULATED BELOW

Still on the Notice of Application, the decisions and orders in respect of which relief is sought are listed thus therein:

> "1 The decisions by the Immigration Department to classify the Applicants as "ECVIIs" (Ex-China Vietnamese Illegal Immigrants) .
>
> 2. The decisions by the Immigration Department and/or Security Branch not to screen the Applicants for refugee status with respect to persecution they face in both Vietnam and China.
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> 3. The decisions of the Director of Immigration and the Chairman of the Refugee Status Review Board not to grant refugee status in the few cases where the Applicants have been screened for refugee status, where those decisions were made contrary to the 1951 Convention generally and where in particular it was not recognised that persons who are forced from a country on account of their race are refugees and, where they are not granted nationality or de facto nationality in the country to which they originally fled, they retain their refugee status upon arrival in another country.
>
> 4. The decision by the Director of Immigration and/or Secretary for Security not to process the 1st Applicant, Mr Nguyen Tuan Cuong, as a "special category" Fang Cheng case, and to make representations that would facilitate his resettlement in a third country.

5. The orders to detain the Applicants, purportedly pursuant to s.32(1)(a) of the *Immigration Ordinance* (hereinafter "the *Ordinance")* and, since 16 August 1993, purportedly pursuant to s.13D(1).

6. The decision by the Director of Immigration and/or Security Branch not to release the Applicants on recognizance after their removal had not been arranged within a short period of time or, further or alternatively, the failure of the Director of Immigration to exercise his discretion to release the Applicants on recognizance after their removal had not been arranged within a short period of time.

7. The decisions of the Director of Immigration and/or Security Branch not to ensure that the Applicants had the opportunity to apply to Vietnamese Government authorities to return to Vietnam voluntarily, other than in exceptional circumstances.

8. The decisions by the Immigration Department and/or Security Branch to remove the Applicants to China as soon as arrangements are made."

Finally on the Notice of Application, the relief sought is listed thus therein:

"1. Certiorari to quash the decisions of the Director of Immigration and/or Security Branch classifying the Applicants as ECVlls; and, further or alternatively, Mandamus to compel the Director of Immigration and/or the Security Branch to exercise their discretion to change the Applicants' status to that of VMs; and

2. Mandamus requiring the Director of Immigration to screen the Applicants for refugee status, with respect to persecution they faced both in Vietnam and in China; and

3. A declaration that under the United Nation's 1951 *Convention Relating to the Status of Refugees* and 1967 *Protocol Relating to the Status of Refugees*, refugees who have neither been granted nationality or de facto nationality by the country to which they fled, retain their refugee status when they flee to another country; and, in the case of the small number of Applicants who have been screened for refugee status and found to be non-refugees, Certiorari to quash the decisions of the Director of Immigration and the Chairman of the Refugee Status Review Board where the decision was made in contravention of the provisions of the 1951 *Convention Relating to the Status of Refugees* and 1967 *Protocol Relating to the Status of Refugees*; and

4. Certiorari to quash the decision of the Director of Immigration and/or the Secretary for Security not to classify Mr Nguyen Tuan Cuong as a "special category" Fang Cheng case and to make representations to facilitate his resettlement in a third country; and further or alternatively, Mandamus to compel the Director of Immigration and/or the Secretary for Security to make representations to facilitate the resettlement of Mr Nguyen Tuan Cuong in a third country; and

5. Certiorari to quash the orders of the Director of Immigration to detain the Applicants purportedly pursuant to s.32(1)(a) and s.13D(1) of the *Ordinance*; and

6. Certiorari to quash the decision of the Director of Immigration and/or Security Branch not to release the Applicants on recognizance when their removal could not be arranged within a short period; and, further or alternatively, Mandamus to compel the Director of Immigration to exercise his discretion to release the Applicants on recognizance until their removal is facilitated; and

7. Certiorari to quash the decision of the Director of Immigration and/or Security Branch not to provide the Applicants with the opportunity to make an application for voluntary return to Vietnam to the relevant Vietnamese authorities, other than in exceptional circumstances; and further or alternatively, Mandamus to compel the Director of Immigration and/or Security Branch to provide the Applicants with the opportunity .o make an application for voluntary return to Vietnam to the relevant Vietnamese authorities; and

8. An extension of time under RSC Order 53 rule 4(1) to challenge the decisions and orders in respect of which relief is sought, where those decisions and orders were made more than three months prior to the filing of this action; and

9. A declaration that detention of the Applicants has been unlawful and that under the *Hong Kong Bill of Rights*, Article 5(5), the Applicants have a right to compensation; and

10. Damages, under RSC Order 53 rule 7, for any period or periods in respect of which it is found that the Applicants were unlawfully detained; and

11. Certiorari to quash the decision of officers of the Immigration Department and/or the Security Branch to remove the Applicants to China as soon as arrangements can be made; and

12. By way of interim relief, a stay of proceedings under Order 53, rule 3(10)(a) so as to prevent the Applicants from being forcibly removed from

the jurisdiction until the determination of the application for judicial review herein or until the Court otherwise orders; and

13. Such further or other relief as may be just."

JUDGE WITHOLDS RELIEF

Sears J held: that the appellants were entitled to be screened to see if they were refugees; and that the Director of Immigration's refusal to screen them was wrong in law. Nevertheless, Sears J exercised his discretion to withhold relief from the appellants.

As for damages, he held that they were not entitled to any because, "although they were deprived of the opportunity of having their refugee status considered", they "have not been unlawfully detained".

GROUNDS OF APPEAL

The grounds of appeal set out in the Notice of Appeal read:

"1. The learned Judge, having found that the Director of Immigration had failed to comply with his statutory duties under s.13D(1) and/or s.13D(3) of the Immigration Ordinance, erred in exercising his discretion against granting the Applicants any relief in that

(1) he wrongly regarded the Applicants as being indistinguishable from illegal immigrants from China (or that they should not be detained under s. 13D of the Ordinance) whereas these Applicants were former residents of Vietnam claiming refugee status and were as such entitled to be dealt with under Part IIIA of the Ordinance (Judgment pp.4 and 10)

(2) he was wrongly influenced by what he conceived to be the policy of the Government to get rid of Vietnamese from Hong Kong (Judgment p.10)

(3) in the absence of any or adequate evidence of administrative inconvenience he exercised his discretion against the Applicants on the ground of administrative inconvenience. (Judgment p.11)

(4) insofar as it is implicit in the Judge 's reason that such administrative inconvenience consists of or includes the Director performing his statutory duties under Part IIIA of the Ordinance, such administrative inconvenience is irrelevant and/or is not something to which the Learned Judge ought or was entitled to have regard

(5) insofar as the Learned Judge was influenced by any delay in seeking relief by the Applicants, particularly having regard to the fact that any such delay was not culpable, nor was it contended on behalf of the Crown that the Applicants were guilty of delay culpable or otherwise.

(6) the Learned Judge failed to recognize that the Applicants had a legitimate expectation to be screened for refugee status on the basis of the notice given to them upon their arrival in Hong Kong waters whereupon the Applicants consented to remain in Hong Kong and submit to detention on the condition that they be screened for refugee status. The Director of Immigration was bound to give effect to that promise.

2. The Learned Judge erred in finding that detention of the Applicants under s.13D(1) of the Ordinance was lawful and that the Applicants were therefore not entitled to damages in that by failing to screen the Applicants for refugee status the Director of Immigration has illegally detained them pursuant to Section 13D(1) of the Ordinance because, as the Learned Judge found, that section authorizes detention only for the purpose of screening and removal if an applicant is found not to be a refugee after screening and any subsequent appeal.

3. The Learned Judge erred in finding that detention of the Applicants was lawful and that the Applicants were therefore not entitled to damages in that, upon arrival in Hong Kong waters, the Applicants only decided to remain in Hong Kong and consented to administrative detention on the basis of a Hong Kong government promise that if they did so, they would be screened for refugee status and this promise was broken.

4. The learned Judge erred in refusing to consider the Applicants' claim for damages notwithstanding his finding that these Applicants were deprived of an opportunity of having their refugee status determined (Judgment p.12)."

RESPONDENT'S NOTICE

A Respondent's Notice has been filed. In its original form, it said that Sears J's judgment should be affirmed on grounds other than those upon which he relied in that:

> "(1) The learned judge erred in holding that the Director of Immigration is under an obligation to screen the Applicants, in that he wrongly construed s. 13A of the Immigration Ordinance, Cap. 115 ("the Ordinance") as conferring a right in all or any former or previous residents of Vietnam detained under s. 13D of the Ordinance to be examined or screened for refugee status should such a claim be made.
>
> (2) The learned judge erred in finding that the Government was wrong to deal with the Applicants under Part IIIA of the Ordinance but that, as they were in fact detained under s. 13D(l) of the Ordinance, he must assume that the Applicants are former residents of Vietnam and therefore fall within the ambit of Part IIIA. The Respondents contend that the term "resident or former resident of Vietnam" includes persons such as the Applicants but the Respondents maintain that the fact that a person is able to be detained under s. 13D(1) does not result in a statutory duty being imposed on the Director of Immigration to make a decision under s.13A of the Ordinance, nor is there an obligation on the Director to screen such a person should a claim for refugee status be made.
>
> (3) The learned judge erred in construing s. 13D of the Ordinance, as amended in 1991, so as not to admit a power to detain under that section subsequent to a decision to refuse permission to remain under s. 11 but instead to require, as a condition precedent to the power of detention under that section subsequent to a refusal, a decision to refuse permission under s.13A.
>
> (4) The learned judge failed to recognize that any right to be screened accorded to a person who was previously resident in Vietnam arises from a legitimate expectation based on the Statement of Understanding with the UNHCR of September 1988 entered into by the Hong Kong Government and not as a result of any statutory duty found in the Immigration Ordinance and, in particular, s. 13A. The Respondents contend that s. 13A of the Ordinance confers a statutory power, to be used or not by the Director of Immigration in accordance with his lawful policy to allow Vietnamese refugees, however established as such, to legally land and remain in Hong Kong, pending resettlement elsewhere."

On the last day of the hearing, the respondents applied to amend their Respondent's Notice to add a fifth ground. That amendment was not opposed. And we allowed it. The fifth ground so added reads:

> "(5) In addition to deciding to refuse relief for the reasons set out, the learned judge should have also refused relief on the ground that such relief would be futile in that no useful purpose would be served by screening the applicants due to the acceptance by China of the applicants for settlement and resettlement and in accordance with the evidence before the court"

RELIEF SOUGHT ON APPEAL

In the Notice of Appeal, the relief sought on appeal is set out as:

> "(1) an order of mandamus requiring the Director of Immigration to consider the Applicants' claim to remain in Hong Kong as a refugee in accordance with Part IIIA of the Immigration Ordinance ("the Ordinance")
>
> (2) an order of mandamus requiring the Director to notify the Applicants of his decision regarding their claim to remain in Hong Kong as a refugee, and if adverse, to serve or cause to be served a notice on the Applicants in accordance with s.13D(3) of the Ordinance
>
> (3) further or alternatively, for damages for wrongful detention to be assessed
>
> (4) that the costs of the application be taxed and paid by the Respondent."

ARGUMENTS AND ANALYSIS

Mr Robert Tang QC who leads for the appellants dealt with all aspects of their case apart from damages.

Mr Tang's junior followed, dealing with the question of damages. He accepted that the appropriate course is to raise it after we have given our decision on the other questions.

Sections 13A(1), 13D(1) and 13D(3)

Three provisions of the Immigration Ordinance, Cap. 115, upon which much argument has been addressed in the present case are sections 13A(1), 13D(1) and 13D(3).

Section 13A(1) reads:

" 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 after 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."

Section 13D(1) reads:

" 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)."

And section 13D(3) reads:

" 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)."

Detention

It is common ground that the appellants are being detained under section 13D(1).

For the respondents, which includes the Director of Immigration ("the Director") under whose authority the appellants are being detained, Mr William Marshall QC contends they are being detained under the second limb of the detention power contained in section 13D(1). In other words, he contends that they are being detained "after [decisions] to refuse [them] such permission [and] pending [their] removal from Hong Kong."

Not so, says Mr Tang. He contends that the appellants are being detained under the first limb of that detention power, in other words, "pending a decision to grant or refuse [them] permission to remain in Hong Kong.

Mr Marshall submits that the Director was entitled to detain the appellants under section 13D(1) without refusing them permission to remain *as refugees*. The Director was entitled, Mr Marshall submits, to detain them under section 13D(1) after refusing them permission to remain *simpliciter*. In other words, Mr Marshall submits, the Director was entitled to deal with the appellants under his general power of immigration control contained in section 11. And that, Mr Marshall contends, is what the Director has done.

Entitlement in law

Mr Tang submits that the appellants, having fled Vietnam, were entitled in law to have their positions considered under the special power contained in section 13A(1) pertaining to persons previously resident in that country. Persons like them would, he submits, have that entitlement unless it is plain that they can no longer be Vietnamese refugees because they had properly resettled elsewhere before arriving here.

Mr Marshall seeks to counter that by saying that it is plain that they had indeed properly resettled elsewhere, namely China, before arriving here.

There is a dispute between the parties as to how ethnic Chinese fleeing Vietnam were received in China.

On the evidence, it is certainly plain that by now at least China so unquestioningly properly resettles 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, so that section 13A(1) is clearly not the provision under which to deal with any such arriver. (And that, which applies equally to new and repeat arrivers alike, puts an end to Mr Marshall's "floodgates" argument.) But is it plain that the position in China has always been what it now is, so that all the appellants must have been properly resettled in China before coming here?

I am disposed to think that China's policy towards ethnic Chinese fleeing Vietnam would have been a benevolent one from the start. But policy is one thing and implementation is another. When one has the displacement of human beings on this scale, things are bound to be far easier said than done. Might it not be the case that, for one reason or other, these appellants had not in fact properly resettled in China before leaving for Hong Kong?

The time it took to persuade China to accept them back rather suggests that that might indeed be the case. No, says Mr Marshall, it took all that time because the appellants had sabotaged efforts to effect their return to China, doing so by refusing to supply information about themselves and even by supplying positively misleading information about themselves. But Mr Tang disputes the allegation of sabotage. There is no finding by the judge of sabotage. And there is nothing to warrant our making such a finding.

Mr Marshall concedes that there is *power* to deal with the appellants under section 13A(1). But he denies that there is any *duty* to do so. What he submits about section 13A(1) is what he submits about the whole of Part IIIA of the Immigration Ordinance, Cap. 115, which part is headed "Vietnamese Refugees" and consists of sections 13A to 13H, which sections bear out that heading. And that submission (taking it from paragraph 2.2 of the respondents' skeleton argument) is that Part IIIA is merely "a collection of powers and enabling provisions".

In this connection, Mr Marshall cites the decision of this Court in *Chan Heung Mui v. Director of Immigration*, Civil Appeal No. 168 of 1992, March 24, 1993, (unreported) dealing with section 13 of the Immigration Ordinance, Cap. 115. Section 13 falls outside of Part IIIA; and it reads:

> " The Director may at any time authorize a person who landed in Hong Kong unlawfully to remain in Hong Kong, subject to such conditions of stay as he thinks fit, whether or not he has been convicted of that offence, and section 11(5), (5A) and (6) shall apply to him as it applies to a person who has been given permission to land in Hong Kong under section 11(1)."

Mr Marshall says that what this Court said then about section 13 sheds light on the proper approach now to section 13A(1). The leading judgment was given by Litton JA, with whose reasoning and conclusions Mortimer J entirely agreed. Godfrey J gave a judgment which concurred in the result.

There the Director *did* deal with the illegal immigrants under section 13. So that case is for that reason, quite apart from any other reason, wholly different from the present one.

The first complaint against the section 13 refusal in that case was made on the basis that the humanitarian grounds put forward by the illegal immigrants had not been considered. But at p. 13, Litton JA pointed out that the evidence showed conclusively that those grounds had been considered, thus disposing of that complaint.

It was then that Litton JA went on to say this (still at p. 13):

> "Section 13 of the Ordinance imposes no statutory duty of any kind upon the Director, beyond the broad duty falling upon him to administer the scheme of immigration control embodied in the Ordinance fairly and properly."

So one can see that Litton JA did not say that section 13 imposes no duty. Rather, he pointed out that such duty did not go beyond "the broad duty falling upon [the Director] to administer the scheme of immigration control embodied in the Ordinance fairly and properly."

The appellants fled from Vietnam. They appear to have done so in circumstances which gave them reasonable claims to "Vietnamese refugee" status. It is true that they had spent a long time in China after leaving Vietnam and before arriving here. Nevertheless, it is not clear beyond reasonable argument to the contrary that they had become properly resettled in China so that any Vietnamese refugee status which they may have had would have been lost.

Now, take someone who arrives here after fleeing Vietnam in circumstances which gave him a reasonable claim to Vietnamese refugee status. And assume that it is not clear beyond reasonable argument to the contrary that he had before arriving here lost such status by becoming properly resettled elsewhere. Would refusing even to consider his position under section 13A(1) be in conformity with a broad duty of the kind described by Litton JA in the passage which I have quoted? I think that it would not.

Mr Marshall also referred to this passage in Litton JA's judgment (at p. 16):

> "Assume, for instance, that Hong Kong were to be overwhelmed by a great influx of illegal immigrants, as has happened in the past. Is the Director not at liberty to make removal orders under section l9(1)(b)(ii) and, after the period of appeal to the Immigration Tribunal has passed, to cause such orders to be forthwith executed? Is the Director bound to pause in the process, in order to entertain "applications" for the exercise of his discretion under section 13? Is he bound to consider every case on "humanitarian grounds" before deciding to repatriate the illegal immigrants to China? Having regard to the scheme of the Ordinance, this appears to me an extravagant proposition. Section 13 says nothing about "applications" by illegal immigrants on humanitarian or any other grounds. Section 13 is an empowering provision; it would be an odd thing if, because of the current "humanitarian" practice of the Director, his future powers of action have become emasculated. A court would hesitate, in construing a statute, to give it such effect."

Are those steps so very different from a quick "yes or no" decision under section 13A(1) promptly followed, in the event of a refusal, by a notice under subsection (3) and a review by the Board with no undue delay being tolerated? I do not think that they are.

What about the time which it would have taken to deal with the appellants under section 13A(1) and, in the event of refusals thereunder, on review? There is no evidence to show that it would have taken longer than the way in which they have in fact been dealt with.

And this is also to be borne in mind. If someone requests permission to remain here as a Vietnamese refugee pending resettlement elsewhere but his position is considered without reference to the "refugee" element of his request, then his request is almost bound to fail whatever its true merits. And upon its failure, he becomes liable to detention pending his removal. He will lose his liberty with nothing to show for it. So a proper respect for freedom of movement also constitutes a reason to

construe section 13A(1) as carrying a duty at least to consider thereunder the position of people like the appellants.

That is how I construe section 13A(1). So, like the judge in the court below albeit by a somewhat different process of reasoning, I arrive at the conclusion that the appellants are in law entitled to have their positions considered under section 13A(1) and to be served with notices under section 13D(3) if they are refused permission under section 13A(1) to remain here as refugees pending resettlement elsewhere.

Discretion

The remaining question is whether the judge was justified in exercising his discretion so as nevertheless to withhold from the appellants relief by way of judicial review.

I am unable to support the *reasons* which the judge gave for so exercising his discretion. There is no need to recite his reasons. They are indicated by the grounds of appeal which I have quoted. And they do not represent the primary basis on which Mr Marshall asks us to uphold the *result* at which the judge arrived in the exercise of his discretion.

Primarily, Mr Marshall submits that even if the Director were ordered to deal with them under section 13A(1), the appellants would have no real chance of obtaining his permission thereunder to remain here as refugees pending resettlement elsewhere. Nor, Mr Marshall submits, would they have any real chance of obtaining such permission through a review before the Board.

Mr Tang does not accept that the appellants have no real chance of permission either at the hands of the Director or of the Board. Nor does he accept that it is open to Mr Marshall even to run the argument that they do not. He concedes, however, that if the argument is open to Mr Marshall and if it be true that the appellants have no real chance of permission from either quarter, then it would be appropriate for us to exercise our discretion so as to refrain from compelling the Director to deal with the appellants under section 13A(1).

That concession is, in my view, correctly made. The courts never take any infringement or denial of a legal right lightly. But if it is clear that no useful purpose would be served by judicial intervention, then the courts will not intervene. If the appellants have no real chance of getting anything worthwhile out of our stepping in and it would only prolong their detention here, then we should refrain from stepping in.

Would the appellants have a real chance, even if only a slim one, of obtaining what they want at the hands of the Director or, if necessary, of the Board in the event of their being dealt with by the Director under section 13A(1)?

The following scenario is that one which I consider at least probable in that event. The Director will say that even assuming that they had acquired and still retain Vietnamese refugee status, there is no prospect of any country other than China accepting the appellants for resettlement. China and China alone will accept them. Since they do not want to go back to China even though China will accept them, he will say

that the permission which they seek under section 13A(1) is permission to remain pending resettlement in any country other than China. But since no other country will accept them, he will refuse them permission under section 13A(1). Instead, he will detain them under section 13D(1) after such refusal and pending their removal from Hong Kong. And then he will order their removal from Hong Kong under section 13F (which provides that he "may at any time order any Vietnamese refugee or person detained in Hong Kong under section 13D to be removed from Hong Kong"). In other words, he will send them back to China.

Then the Board, if the matter is brought before it, will say that the Director's decisions did not turn on refugee status. Rather they were made assuming such status in the appellants' favour. And so it, the Board, cannot or should not intervene.

And if that is how the appellants fare at the hands of the Director and of the Board, I see no real prospect of their obtaining leave to apply for judicial review of the Director or the Board's decisions.

It comes down, therefore, to this: is the scenario which I have described as at least probable in truth inevitable?

All things considered, I do not think that one can go so far as to say that it is inevitable. Unless one assumes that the Director's mind is closed and will remain closed - which I do not assume - things are not as clear-cut as that.

Mr Marshall also relies on delay and detriment to good administration. I would not withold relief on either of those bases. The appellants did not sit on their rights. They were unaware of them. So was, as it happens, the Director despite all the legal advice so readily available to him. And as for good administration, I think that it is dealing with the appellants otherwise than in strict conformity with the law which would, in all the circumstances, be detrimental to good administration.

Accordingly, I would not withold relief from the appellants. I am well aware that it is no kindness to bolster up hopes which are likely to be dashed. But the appellants will appreciate that, although I stop short of saying that they have no chance, I have warned them that their chances are slim. They wish to exercise their entitlement under section 13A(1). And I see no sufficient warrant for witholding that entitlement from them.

RESULT

In the result, I would allow each appellants' appeal and order by *mandamus*:

(i) that the Director deal with each appellant under section 13(A)1, either giving or refusing him or her permission to remain here as a refugee pending resettlement elsewhere; and

(ii) that in the event of any refusal of such permission, the Director serve on each person so refused a notice under section 13D(3) of his or her right to apply for a review under section 13F(1).

As to costs, I would make an order nisi for costs in favour of the appellants here and below.

That leaves only the question of damages. In case the appellants wish to pursue the appeal against the judge's refusal to award them damages, a course which I am not to be taken to be encouraging them to take, I would: (i) give them liberty to take out a notice of motion, by 12 noon on Friday, March 1, 1996, at the latest, for this Court's directions as to the disposal of that appeal, thus giving them the three weeks which they asked for; and (ii) order that such appeal do stand automatically dismissed if no such notice of motion is taken out by that deadline.

Finally, I thank counsel on both sides for their assistance in this difficult and distressing case.

Mortimer JA:

This is an appeal against the decision of Sears J. He exercised his discretion to refuse relief on judicial review to the 228 applicants who applied to strike down the decision of the Director of Immigration (the Director) under s.13E of the Immigration Ordinance, Cap.115 to remove them from Hong Kong to China. Section 13E(1) provides:

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

The facts

The appeal is complicated by the number of applicants. However, it suffices to say that each applicant originally left Vietnam many years ago and has since resided in China for between 5 and 10 years before coming to Hong Kong. ~~Broadly, m~~Most left Vietnam between 1978 and 1979 in consequence of the~~before and during the~~ Sino-Vietnam War. They ~~each~~ arrived in Hong Kong between 1990 and 1994 as 'former' or 'previous' residents of Vietnam, claiming refugee status in order to take advantage of the preferential treatment given to those arriving here~~in Hong Kong~~ from Vietnam. ~~Although each had spent between 5 and 10 years in China before 1990 and after originally leaving Vietnam, t~~They each claim~~ed~~ not to have lost his or her ~~their~~ status as a refugee~~s~~ consequent upon any 'resettlement' in China. (See Article 1E of the International Convention on Refugees.)

On arrival in Hong Kong each was~~they were~~ examined under s.4 of the Ordinance and the claim to be a refugee~~s~~ must have ~~then~~ been considered. Clearly, every~~their~~ claim was rejected because ~~they were refused~~ permission to land and ~~refused permission~~ to remain in Hong Kong under s.11 of the Ordinance was refused.

Detention in Hong Kong

It is conceded that each~~all the~~ applicant~~s are~~ is a 'former resident~~s~~' of Vietnam or was~~were~~ a 'previously resident~~s~~' there ~~in Vietnam~~ (or a child~~were children~~ of one)~~those who were~~ within the meaning of Part IIIA of the Ordinance. Consequently, they were all

detained under s.13D(1) as former residents. The relevant part of s.13D(1)~~this section~~ provides:

> "… any … former resident of Vietnam … may, whether or not he has requested permission to remain in Hong Kong, be detained under the authority of the Director … pending a decision to grant or refuse him permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong …"

It is convenient to refer at this stage to~~There are~~ two other provisions relied upon by the applicants:

> "13A(1) An immigration officer … may permit any person—
>
> (a) who was previously resident in Vietnam and who has been examined under section 4(1)(a); …
>
> to remain in Hong Kong as a refugee pending his resettlement elsewhere."

and

> "13D(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)."

The review under s.13F(1) is a review of the decision that he may not remain in Hong Kong as a refugee by the Refugee Status Review Board (RSRB).

So, the Director refused the applicants permission to remain under s.11~~,~~ (not under s.13A), and detained them under s.13D(1) exercising the power to detain after a decision to refuse permission had been made~~ pending removal from Hong Kong~~. They were therefore detained as non-refugees. Afterwards~~Save in the case of 5 applicants who join these proceedings only to claim damages~~, no notice~~s were~~ was given

under s.13D(3) and no~~ne was~~ offer~~ed~~ of a review by the RSRB was made~~Refugee Status Review Board~~ before the Director exercised his powers under s.13E to order their removal to China.

The applicants' case

Mr Robert Tang QC~~QC~~ with Mr Dykes~~,~~ for the applicants, submit that the judge was right to find that they are former residents of Vietnam, subject to Part IIIA of the Ordinance in respect of whom the Director has exercised his powers under s.13D that each had been wrongly deprived of a notice under s.13D(3) and a review by the RSRB~~Refugee Status Review Board~~.

~~The basis of the decision is simply that the applicants arrived in Hong Kong claiming to be refugees from Vietnam. If they are found to be refugees they can expect to remain pending resettlement under s.13A and then be detrained under s.13D. On the other hand, if they are found not to be refugees, a refusal to allow them to remain as refugees whether expressed under s.11 or not amounts to a decision under s.13A to refuse permission with the accompanying right to a notice under s.13D(3) and a status review board hearing. The Director, through Mr Marshall QC, submits that in this the judge was wrong. In these cases he submits that the Director was entitled to exercise his powers under s.11 to refuse permission to remain and then to detain under s.13D(1) without reference to or the exercise of any power under s.13A. He submits that the amendment to s.13D(1) in 1989 to remove the words 'as a refugee' from this subsection was for the very purpose of exercising the power in the circumstances of these cases.~~

He was right therefore to find that the exercise of the power under s.13E to remove the applicants without affording them a review was unlawful but, counsel submit that the judge was wrong to refuse relief in the exercise of his discretion.

In summary, they say that it was not open to the judge to assume without argument that the applicants were to be equated with Chinese illegal immigrants; he was not entitled to take into account Government policy on the return of non-refugees to Vietnam; and he ought not to have given such weight to the applicants' delay in bringing proceedings when the Director's decision was plainly unlawful and the applicants had been held in closed camps without readily available legal advice. Finally, they contend that relief would not be futile because, if some of the applicants are found to have refugee status, they would have a chance of being resettled elsewhere than China.

The Director's case

The Director, through Mr Marshall QC, submits that the judge was wrong in holding that the applicants had been refused permission under s.13A. He contends that the Director was entitled to exercise his powers to refuse permission under s.11 and then to detain under s.13D(1) without reference to the exercise of any powers under s.13A. He submits that the amendment to s.13D(1) in 1989 to remove the words *'as a refugee'* from this subsection was for the very purpose of empowering the Director to detain after refusing permission to remain under either s.11 or s.13A.

-Previously ~~the section~~ s.13D(1) read:

> "… pending a decision to grant or refuse him permission to remain *as a refugee,* or …"

So, Mr Marshall submits that the Director made no ~~has not made a~~decision to refuse permission to remain ~~in Hong Kong as a refugee~~ under s.13A, only a refusal under s.11, therefore, ~~there has been no refusal of permission to remain in Hong Kong as a refugee and~~ no rights or duties under s.13D(3) have arisen and the applicants have no right to a review by the RSRB~~Refugee Status Review Board~~. Consequently, he contends that the Director exercised his wide powers under s.13E to remove the applicants lawfully.

Mr Marshall also submits that in any event the judge's refusal to grant relief was a proper exercise of his discretion. Alternatively, he says this Court should exercise its own discretion to refuse relief on the grounds that it would be futile for these applicants to be given a review. A review would simply raise false hopes because even if an applicant were screened in as a refugee, the Director could and would still lawfully remove him to China for resettlement.

Refusal of permission to remain in Hong Kong as a refugee and s.13A

One must have sympathy for the Director's difficulties. Reacting to changing circumstances and decisions of the court, the Ordinance — and particularly s.13D — has been amended piecemeal. Whereas I have little doubt that in removing the words 'as a refugee' from

s.13D(1), it was the intention to widen the power to detain after a refusal to allow a person who has arrived in Hong Kong to remain here under s.11 as well as a refusal under s.13A. in my judgment~~But~~ this does not assist the Director when the amended section is read in the whole context of the Ordinance.

Once it is accepted — as it is — that the Director was justified in treating these applicants as falling within the provisions of Part IIIA and therefore entitled to the advantageous treatment accorded to those from Vietnam, certain consequences follow. First, they all arrived claiming to be refugees from Vietnam and~~. They all~~ asked for permission to remain ~~in Hong Kong~~ as refugees. They were refused permission to remain under s.11 but it is impossible to avoid the conclusion that ~~permission that by~~ necessary implication does not dictate that in these circumstances t~~, \~~hey were refused permission to remain as refugees under s.13A as well.

Although the interpretation of s.13D as amended is not easy, it is my conclusion that each applicant has been refused permission to remain in Hong Kong as a refugee under s.13A and therefore that each is entitled to a notice under s.13D(3) and a review of that decision by the RSRB. Of this, they have been deprived. *Prima facie* each is entitled to a review before the Director exercises his power under s.13E to remove them to China. It follows that I agree with the judge that the Director's decision to remove them to China is unlawful.

Discretion

~~The remedies on judicial review are discretionary.~~ The judge ~~decided to~~ refused relief in his discretion on the grounds

(a) that the applicants should not have been detained under s.13D as properly regarded they are Chinese illegal immigrants;

(b) that they ~~-~~who should be returned to China in accordance with Government policy, and

(c) ~~. Also, he refused relief~~ that the substantial delay in bringing the proceedings was prejudicial to the Government and contrary to good administration.

Although I have sympathy to the judge's tentative view upon the applicability of Part IIIA of the Ordinance to these applicants in the absence of argument ~~submissions and for my part~~ I think it was not open to him to exercise his discretion on the basis that these applicants were to be regarded as illegal immigrants from China. Also, where there has been an unlawful decision which affects fundamental rights he was wrong to refuse relief to support Government policy.

On delay, he~~the judge~~ was on firmer ground. It is hard to believe that each of these applicants were totally unaware of his possible right to a ~~'screening process' and unaware of the fact that they were not being accorded~~ hearing before the RSRB ~~review board~~. Furthermore, 23,000 persons in similar circumstances have been returned to China without being accorded the 'screening process'. It ~~certainly~~ would be detrimental to good administration should any substantial number of these people

come to Hong Kong to seek to enforce their rights at this late stage when ~~the cases of~~ less than 250 now remain here. Nevertheless, it would be a harsh decision to deprive them of a right of review on the grounds of delay when access to legal advice in closed camps must have been limited. I am satisfied that the judge's exercise of discretion was flawed~~fraud~~ and that it falls to this Court to consider the exercise of discretion afresh.

Clearly, even if justice requires that the delay is disregarded, relief ought not be given if it will serve no useful purpose.

As I see it, the position is this. I accept that there is a chance that some of the applicants will be able to establish that they left Vietnam long ago as refugees and that in spite of their stay in China~~, they have not resettled there within the meaning of the Convention and~~ have not lost their refugee status. Will the granting of relief assist any such applicant? It~~such persons. In considering this it~~ is necessary to turn first to the Director's powers under s.13E. Of course, he must exercise those powers *bona fide* and within the law.~~ and he must exercise them *bona fide*.~~ None of the applicants claims that he is a refugee from China. China has undertaken, not only to take the applicants back,~~in~~ but also to accord each household registration with all that entails. ~~A question is raised by~~ Mr Dykes questions~~ for the applicants~~ whether these undertakings will be fulfilled. But as~~they are~~ undertakings by a sovereign power, ~~and~~ there is no reason to believe~~think~~ that they ~~the undertakings~~ will not be honoured once the administrative process has been completed.

In these circumstances 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 to China without delay now that China has agreed to accept him. As a former resident of China whom China is prepared to take back and accord rights, the chances of him being resettled in any other part of the world within a reasonable time — or at all — must be so remote that they can be ignored.

Nor do I take the view that in the circumstances there can~~could~~ be any reasonable grounds for the person concerned to seek to avoid being returned to China under the Director's ~~. Indeed, I have doubts whether such a person could seek to refuse to return there under s.13A(3). This section seems to me to only afford rights to those who have been given an offer of resettlement and are seeking to refuse to go voluntarily. The exercise of the~~ power under s.13E.~~ is not subject to that condition.~~

For these reasons, I am satisfied that any relief granted to the applicants would serve no usual purpose and would only raise false hopes of future resettlement elsewhere than China. I would ~~dismiss these appeals and~~ exercise my discretion to refuse relief — although on ~~other~~ different grounds to those relied upon by the judge — and I would dismiss these appeals.

Damages

It is unlikely that any question of damages will arise but we have not heard submissions on the matter. I am content that we should make the order proposed by Bokhary JA.

Mayo JA:

For the reasons which have been given by Bokhary JA and Mortimer JA I have no doubt that Sears J was right in coming to the conclusion he did that the Director of Immigration was exercising his powers under Part IIIA of the Immigration Ordinance Cap 115 when he issued the Notices of Detention under s13D(1) of the Ordinance in relation to these applicants.

On the basis of the facts which were before Sears J after these applicants landed in Hong Kong they claimed to be Vietnamese Refugees. It was undoubtedly incumbent on the Director to consider their applications pursuant to Part IIIA of the Immigration Ordinance.

Where such a claim is made the person making the claim is entitled to have a determination of their claim to refugee status. If they are not satisfied with this determination there is a right of appeal to a Refugee Status Review Board.

However Sears J declined to grant the relief sought in the application for judicial review which was before him. This was on the basis of the exercise of the discretion reposed in him.

At pages 10 and 11 of his judgment he gives his reasons for exercising his discretion in the way he did. He gives three reasons which I think can shortly be summarised as follows:-

1. He disputes the Decision of the Director to detain the applicants under s13D of the Ordinance. As the applicants had stayed in China for a considerable period of time after leaving Vietnam and prior to their arrival in Hong Kong the judge did not think that the applicants should have been considered by the Director as being refugees.

2. According to Sears J it was the policy of the Hong Kong Government to remove as many illegal immigrants as possible from Hong Kong. He did not think that a group of people such as the applicants should be allowed to remain here.
3. Delay in making the application.

At the conclusion of the reasons he gave for the exercise of his discretion he said:

> " I am not saying that the rule of law is subservient to administrative convenience because the rule of law must prevail and although I have held that legally speaking these persons who are treated as Vietnamese refugees were entitled to be screened, nevertheless, one must have regard to all the surrounding circumstances of a particular case.
>
> I am mindful of the harrowing stories told by these persons. I am naturally very sympathetic to them. On the other hand, I must still do my duty as best I may and decide whether I should exercise my discretion in favour of this small group, knowing that the bulk of the people have been dealt with in a completely different way and have already been resettled in China.
>
> I consider that it would be prejudicial to the Government. The screening process would have to be re-operated. There would be a substantial period of time for this to be operated, and, in my judgment I should not grant any of these persons the orders they seek and so in the exercise of my discretion, I refuse their applications for judicial review."

With the exception of the third reason given namely the delay in making the application I do not think that any of the other reasons given were valid justification for this exercise of discretion.

1. The applicants claimed refugee status. In my view they were fully entitled to do so and they had a right to have this claim determined pursuant to the provisions contained in Part IIIA of the Ordinance.

2. With respect to the learned judge the reasons he gives here are over simplistic. It is not the policy of the Hong Kong Government to remove illegal immigrants in the manner described in the judgment. The Government has a humane policy towards Vietnamese Refugees and the Director must validly exercise the powers reposed in him under Part IIIA.

In so far as the judge's summary of his reasons depends upon administrative convenience I think he has misconceived the position.

In as much as the matters referred to were of any relevance what had to be considered was whether a case could be made out that if the relief sought was granted this would be prejudicial to good administration.

There was insufficient evidence before the judge to enable him to arrive at this conclusion.

As it would appear that the judge wrongly exercised his discretion it is our duty to interfere with it and attempt to exercise it correctly.

In my opinion the relief sought should not be granted as on the evidence which was before the judge it is inevitable that if the screening process were to be undertaken now or in the foreseeable future the applicants would have no chance at all of obtaining permission to remain in Hong Kong and be settled in a country other than China.

Evidence was adduced that China was made a commitment to accept these applicants for settlement in China including a statement that they would be entitled to be registered so as to obtain full rights of residence.

Mr Dykes for the applicants submitted that having regard to the treatment some of these people received when they were in China it was definitely within the realms of possibility that a Review Board would conclude that an applicant should not be required to settle in China.

He further argued that it was one of the tenets of such applications that where there was any possibility of a refugee obtaining asylum in another country consideration would be given to all of the circumstances and that it was not inevitable that the applicants would have to be settled in China.

With respect I do not consider this to be a realistic assessment of the situation.

Having regard to the solemn commitment which has now been made by China I do not believe that any other country would now offer asylum to these applicants.

Also it is difficult to imagine that the Director would permit the applicants to remain in Hong Kong awaiting resettlement elsewhere in the light of the offer made by China.

In my view were we to order that the screening process was to be proceeded with there could be only one result. That would be that the applicants would not be permitted to remain in Hong Kong while attempting to obtain asylum elsewhere.

I find myself in agreement with Sears J on the question of delay. Even taking cognisance of the unfortunate situation these applicants find themselves in the substantial delay which had occurred has not been justified and this of itself would be a good ground for declining to grant the relief sought.

For the reasons given I am of the view that the relief sought should not be granted and that the appeal should be dismissed. As to damages I agree with the proposal suggested by Bokhary JA.

Bokhary JA:

By a majority, therefore, the appeal is dismissed save to the extent that it is against the judge's refusal to award the appellants damages.

As to the appeal against such refusal, we: (i) give the appellants liberty to take out a notice of motion, by 12 noon on Friday, March 1, 1996, at the latest, for this Court's directions as to the disposal of the same; and (ii) order that it do stand automatically dismissed if no such notice of motion is taken out by that deadline.

If the appeal against such refusal proceeds, the costs of the appeal as a whole will be dealt with after the appeal against such refusal has been decided.

And if it is automatically dismissed because no notice of motion for directions as to its disposal is taken out by the deadline for doing so, the costs of the appeal as a whole will be dealt with after argument on a date to be fixed in consultation with counsel's diaries.

Whatever else may be done as to costs, there will be an order for legal aid taxation of the appellants' own costs.

(K Bokhary)	(Barry Mortimer)	(Simon Mayo)
Justice of Appeal	Justice of Appeal	Justice of Appeal

Mr Robert Tang QC and Mr Philip Dykes
(instructed by Pam Baker & Co.) for the appellants

Mr William Marshall QC and Ms D Watson
(of the Attorney General's Chambers) for the respondents