HCMP001506/1990

1990, MP No.1506

HEADNOTE

Judicial review by two Vietnamese Boat People who challenged a number of decisions made by officers of the Hong Kong Government under the Immigration Ordinance and the validity of their detention in a Detention Centre pursuant to s.13D(1) of the Immigration Ordinance. Abuse of process.

1990, MP No. 1506

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

In the Matter of An Application by TRAN QUOC CUONG
and by KHUC THE LOC

for Judicial Review and for
an Order of Certiorari and
an Order of Mandamus

In the Matter of a decision of the

Secretary for Security

and

In the Matter of decisions of the

Director of Immigration

and

In the Matter of decisions of the

Commissioner for Correctional Services

Coram : Hon. Jones, J. in Court

Dates of hearing : 31st January, 1st, 4th-8th February, and 8th-11th April 1991

Date of delivery of judgment : 8th May 1991

JUDGMENT

Introduction

This is an application for judicial review by two Vietnamese boat people, Mr Tran Quoc Cuong and Mr Khuc The Loc (the applicants), that challenges a number of decisions of the Hong Kong Government made by the Secretary for Security, the Director of Immigration and the Commissioner of Correctional Services, or their subordinates, with regard to the implementation of its policy for the detention of Vietnamese refugees as illegal immigrants. Two of the decisions also concern officers of the Royal Hong Kong Police Force and the Civil Aid Services.

Relief is sought by way of certiorari to quash those decisions and for an order of mandamus to release the applicants with consequential declarations. Damages including aggravated and/or exemplary damages are also claimed for assault and false imprisonment.

The bulk of the evidence consists of a large number of affidavits or affirmations made by officers of the Director of Immigration, the Correctional Services Department, the Police, the Secretary for Security, the applicants, the applicants' solicitor and various exhibits

including a video tape that was shown during the hearing. An application by the applicants to cross-examine Mr K.C. Cheuk of the Immigration Department and Mr K.F. Yu of the Correctional Services Department was refused for reasons that I have already given.

I do not propose to deal with all the many submissions made by the parties, but to confine them to those which are necessary for my decision.

Policy

I shall first deal with the policy that has been adopted by the Hong Kong Government (Government) with regard to the problem of Vietnamese refugees that emerges from the affidavit of Mr Clinton Leeks, the Refugee Co-ordinator of the Security Branch who was, from May 1982 until January 1985, responsible for the formation of policies on Vietnamese refugees when he was the Principal Assistant Secretary.

He states that since 1975 Hong Kong has adopted a policy of first asylum for Vietnamese refugees. However, from the 2nd July 1982, the Government introduced a policy of closed centres whereby all former residents of Vietnam who were given permission to remain in Hong Kong as refugees pending resettlement elsewhere were detained in closed centres. Prior to the 16th June 1988, all former residents of Vietnam who arrived directly from Vietnam were given permission to remain in Hong Kong as refugees without having to undergo a refugee status determination. On arrival, the refugees were informed of this policy and that they had the right to leave in which case assistance might be given to them. Some Vietnamese migrants have in fact, upon interception chosen to move on in preference to claiming asylum in Hong Kong. A copy of a warning notice that was read to the refugees upon arrival exhibit CL-1, was as follows :-

> " All former residents of Vietnam seeking to enter Hong Kong since 2 July 1982 are detained in special centres.
>
> If you do not leave Hong Kong now, you will be taken to a closed centre and detained there indefinitely. You will not be permitted to leave detention during the time you remain in Hong Kong. It is extremely unlikely that any opportunity for resettlement will be forthcoming.

> You are free to leave Hong Kong now, and if you choose to continue your journey you will be given assistance to do so."

From 1982 until 1987, an average of about 2,000 new arrivals entered Hong Kong each year, but in 1986 there was a large influx of refugees when a total of 18,328 arrived. A further 34,114 arrived in 1989. From 1982 until 1990, total arrivals amounted to 79,324 whilst 42,287 were re-settled and 6,387 were repatriated.

As a result of this large influx, the policy of Government changed as from the 16th June 1988 when all Vietnamese migrants were treated as illegal immigrants unless given permission to remain as refugees under a screening procedure pending resettlement. This led to a new notice, exhibit CL-2, being read to new arrivals which was as follows :-

> "There is a new policy in force in Hong Kong.
>
> Former residents of Vietnam seeking to enter Hong Kong are now treated as illegal immigrants on arrival.
>
> You are free to leave Hong Kong. If you choose to continue your journey you will be given food and water and, if necessary, your boat will be repaired.
>
> If you do not leave Hong Kong you will be detained as an illegal immigrant pending repatriation to Vietnam."

Both applicants arrived during the period when this notice was read to new arrivals.

Since August 1989, a differently worded notice, exhibit CL-3, has been used which reads :-

> " Illegal immigrants are not welcome in Hong Kong and there is no future in Hong Kong for them.
>
> If you choose to remain you will be subject to a screening procedure to determine whether you have a genuine claim for refugee status. You will be placed

in a detention centre until this procedure is carried out. You will not be permitted to leave the detention centre and will not be allowed to take outside employment.

If following the screening procedure it is decided that you are an economic migrant, and therefore an illegal immigrant, you will remain in detention pending repatriation to Vietnam. The majority of persons screened have been found to be economic migrants.

You are free to leave Hong Kong only if you do so immediately, or else you will be detained and treated in accordance with the above."

It has been emphasised throughout that the Government's policy towards Vietnamese migrants is that they are always free to leave if they do not wish to be detained in Hong Kong and they are informed of this position upon their first interception in Hong Kong by the police. Further, since the middle of 1988, Government has attempted to discourage the exodus from Vietnam by broadcasting radio announcements about the policy. Mr Leeks states that from interviews conducted after arrival and intelligence available to the Government, some of the Vietnamese migrants who arrived in Hong Kong were aware of the detention policy prior to leaving Vietnam.

Immigration Ordinance

With the change of policy in 1982 to Vietnamese refugees, substantial amendments were made to the Immigration Ordinance (the Ordinance), Cap. 115, which included the introduction of a separate Part IIIA by the Immigration (Amendment) Ordinance 1981, No.35 of 1981 that deals exclusively with special conditions of stay of Vietnamese refugees under s.13A, appeals against detention s.13B and the designation of refugee centres by s.13C.

It will now be convenient to deal with the scheme of Part IIIA, the subsequent amending legislation and other relevant sections of the Ordinance.

Section 13A enabled an immigration officer to permit a former resident of Vietnam who had been examined under s.4(1)(a) which provides for an immigration officer to determine if a person had landed unlawfully, to remain in Hong Kong as a refugee pending resettlement elsewhere. However, conditions including residence in a refugee centre could be imposed. Any

contravention of stay by a refugee might result in the Director of Immigration (the Director) issuing a warrant under s.13A(6) authorising detention for a period not exceeding 28 days. By s. 13A(7), if a warrant of detention was issued, the Director was required to serve a written notice on the refugee informing him of the ground on which the warrant was issued and of his right of appeal.

Section 13C provided for the Secretary for Security to designate any place as a refugee centre for the residence of Vietnamese refugees while s.13C(2) gave power to the Secretary for Security to make rules providing for the treatment and control of the conduct of Vietnamese refugees in refugee centres and for the maintenance of order, discipline, cleanliness and hygiene in these centres.

Two sections that are contained in other parts of the Ordinance will also have to be considered. The first, s.35, deals with the general provisions with regard to detained persons and provides as follows :-

> "35. (1) Save as otherwise provided in this Ordinance, persons required or authorized to be detained by or under this Ordinance may be detained in such places as the Secretary for Security may by order direct; and the Governor may by order provide for the treatment of persons so detained.
>
> (2) Subject to this Ordinance, the Secretary for Security may direct that -
>
> (a) a person required or authorized to be detained by or under this Ordinance; or
>
> (b) persons of such class or description as he may specify, being persons required or authorized to be detained by or under this ordinance,
>
> may be detained in such other place as he may specify, and -
>
> (i) a person in respect of whom such a direction has been given; or

(ii) a person of any class or description in respect of which such a direction has been given,

may be detained in such place."

The second section s.38 provides for the commission of an offence by a person who lands in Hong Kong illegally. Where relevant, s.38 reads as follows :-

"38.(1) Subject to subsection (2), a person who-

(a) being a person who by virtue of section 7 may not land in Hong Kong without the permission of an immigration officer or immigration assistant, lands in Hong Kong without such permission; ...

(b) ...

shall be guilty of an offence …

(2) A person may land in Hong Kong, without the permission of an immigration officer or immigration assistant, for the purpose of examination under section 4(1)(a) in accordance with arrangements in that behalf approved by the Director, and if he submits himself forthwith to such examination shall be deemed for the purposes of subsection (1) not to have landed unless and until permission to land is granted to him."

The second Vietnamese Ordinance, the Immigration (Amendment) Ordinance 1982 No. 42 of 1982 which came into force on the 2nd July 1982 made further substantial amendments and provided for the detention of Vietnamese refugees and Vietnamese boat people who are not refugees in closed centres.

Section 13A(6) of the previous Ordinance was deleted and was substituted by a new subsection. S.13A(6)(ii) in the new Ordinance enabled the Director, to detain in a refugee centre specified in the warrant any Vietnamese refugee who had contravened any condition of stay or had been found guilty of an offence in Hong Kong punishable with a term of imprisonment. By s.13(6A), the Director was given power to detain a refugee in another

refugee centre specified in the warrant in the interests of good order or management. S.13A(9) provides for the detention of any refugee in a refugee centre designated by the Secretary for Security under a new s.13C as a refugee centre for the detention of Vietnamese refugees. S.13A(10) provides that any person detained under the section shall, unless the Secretary for Security otherwise orders, remain in detention for so long as he remains in Hong Kong.

S.13C(2) of the previous Ordinance was deleted and was substituted by the following :-

> "(2) The Secretary for Security may make rules providing for the treatment, and control of conduct, of Vietnamese refugees in refugee centres and for the management and security of, and the maintenance of order, discipline, cleanliness and hygiene in, refugee centres, and different rules may be made in respect of different centres."

Section 13C(4) provides that any refugee centre designated as a refugee centre for the detention of Vietnamese refugees shall be under the control and management of the Commissioner of Correctional Services notwithstanding ss.13A and 13D and that any refugee detained may be removed by the Commissioner of Correctional Services to another refugee centre.

New ss.13D and 13E were also added and where relevant read as follows :-

> "13D. (1) As from 2 July 1982 any resident or former resident of Vietnam who arrives in Hong Kong not holding a travel document which bears an unexpired visa issued by or on behalf of the Director may, if he has not been granted an exemption under section 61(2), be detained under the authority of the Director in such place as the Director may specify pending a decision to grant or refuse him permission to remain in Hong Kong as a refugee or, after a decision to refuse him permission to remain in Hong Kong, pending his removal from Hong Kong.
>
> (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."

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

In respect of s.13D(1) it has been conceded that the applicants have no exemption under s.61(2) which relates to the requirement of a travel document to have a valid visa.

The changes in the legislation resulted in non-refugees being deprived of being granted any status under s.13A, but provided for their detention under s.13D if they were found not to be refugees pending removal under s.13E.

Two further ordinances were passed in 1989, the first the Immigration (Amendment) Ordinance 1989 No. 23 of 1989 came into force on the 16th June 1989. Section 13D(1) was amended to include references to a child while a new subsection was added which reads :-

"(3) Where a person is detained under subsection (1) after a decision 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 s.13F(1)."

This Ordinance also added s.13F that sets out the procedure for review by a refugee status review board known as the screening process and s.13G which deals with the constitution of the refugee status review boards.

The second Ordinance was the Immigration (Amendment) No. 3 Ordinance 1989 No. 53 of 1989 which came into force on the 20th October 1989 and provides under s.13H for the Secretary for Security to designate any place as a detention centre for the detention of persons authorised to be detained under s.13D. The section provides for detention centres to be under the control and management of an officer appointed by the Secretary for Security, who will either be the Commissioner of Correctional Services, the Commissioner of Police or the Chief Staff Officer, Civil Aid Services. Subsections (3) and (5) of s.13H are relevant and read as follows :-

13H (3) The officer who has been appointed by the Secretary for Security to have control and management of a detention centre may issue such general orders and instructions not inconsistent with this Ordinance or any rules made under this

section as are necessary or expedient for the administration of the detention centre under his control.

(5) The Secretary for Security may make rules providing for the treatment, and control of conduct, of such detainees in detention centres and for the management and security of, and the maintenance of order, discipline, cleanliness and hygiene in, detention centres, and for the punishment of offenders."

Section 13H(6) enables rules to be made for such matters as contravention of the rules, separate confinement, punishment, appeals and for different rules to be made for different detention centres. Section 13H(7) provides that rules made under s.13H(5) may provide that a contravention of any provision thereof shall be an offence.

Until the screening policy was introduced in 1988, Vietnamese boat people had been detained in detention centres specified by the Secretary for Security under s.35 of the Ordinance and with effect from the 3rd November 1989 in detention centres specified under s.13H.

Procedure for Detention of Vietnamese Refugees upon interception in Hong Kong

Evidence of Mr W.Y. Chan

Mr W.Y. Chan, Acting Assistant Director of the Immigration Department in charge of the Vietnamese Refugees Branch, sets out details of the procedures adopted upon the interception of Vietnamese boat people in his affirmation of the 5th February 1991 which reads :-

" The operation of interception involves broadly, from July 1982 onward and continuing, the following elements :-

(a) VBP heading for Hong Kong enter Hong Kong waters.

(b) Marine police intercepts them, stops them and conducts a search of the boat mainly for weapons.

(c) It is usual that the VBP would communicate that they are residents or former residents of Vietnam.

(d) The search usually results in the finding of some Vietnamese identification documents or documents in Vietnamese. So far, to the best of my knowledge, information and belief there had not been any valid travel document bearing an unexpired visa to enter Hong Kong found on any one VBP who has arrived in Hong Kong.

(e) They are informed of detention in Hong Kong in accordance with the warning notices exhibited to the affidavit of Clinton Leeks herein marked 'CL-1', 'CL-2' and 'CL-3' during the relevant period respectively. With effect from August 1989, they have been advised of the screening procedure and that if they be screened out as non-refugees that they will be detained pending repatriation to Vietnam. They are also informed that if they do not choose this they are free to leave.

(f) They are then asked to choose whether to be detained in Hong Kong for screening purpose.

(g) If they elect to come to Hong Kong and to be detained for screening purpose, the marine police radio telephone their officers in headquarters who in turn telephone the Duty Officer of Immigration (Vietnamese Refugees Operation Section). The latter then contacts AD(VR) and ask for a decision on whether to order detention under s.13D(1) of the Immigration Ordinance.

(h) If I decide, or to the best of my knowledge, information and belief, my predecessor decided to detain, it is either expressly stated that they are to proceed to Green Island Reception Centre ('GIRC') (or if it is full the known substitute place of detention for VBP) where the VBP will be detained or, if not, as this has been a much repeated framework of identical operational procedure, it is absolutely clear in my mind and, I believe, the minds of my predecessors, and the marine police officers concerned that they are to be so taken.

(i) The VBP are taken to GIRC and disembark in accordance with set procedures and they are detained there.

(j) My officers will usually interview them within 24 hours ..…"

Mr Chan concluded his affirmation by stating that these procedures have been operated on hundreds of occasions since 1982 and at the height of the 1988/89 influx were on some occasions carried out many times every day.

Evidence of Mr K.C. Cheuk

Mr K.C. Cheuk, Assistant Director of the Immigration Department, in his affirmation of the 1st February 1991, states that he was in charge of the Control and Investigation Branch from June 1988 to September 1988 and while in this position he also oversaw the Vietnamese Refugees Division. He was responsible for the initial oral authorisation under s.13D(1) for the detention of the applicants when they came to Hong Kong which was subsequently confirmed in writing. When he was required to give an oral authorisation, Mr Cheuk said it was not necessary to specify the place of detention for it had been earlier specified by him and his department with the endorsement of the Security Branch in a general agreement with the police that all newly arrived Vietnamese boat people will be taken to the Green Island Reception Centre for initial detention to enable the staff to carry out a preliminary examination, registration procedures and port health clearance. As the capacity of Green Island Reception Centre was limited to just over 700 any excess would be transferred to substitute reception centres which were ferries of the Yaumati Ferry Limited. Mr Cheuk knew that when authorising the initial detention, the Vietnamese boat people would be subsequently tranferred to other detention centres designated under the Ordinance pending a decision to grant or refuse them permission to remain in Hong Kong as refugees under the Ordinance, and that his authorisation was also intended to cover these subsequent transfers. After the screening process had been conducted, a separate detention authorisation under section 13D(1) would be made in respect of those persons who were screened out pending their removal.

Evidence of Mr Michael Ho

Mr Ho, the acting Assistant Principal Immigration Officer and deputy-in-charge of the Vietnamese Refugees Division, is responsible for the preliminary examination, registration,

screening and eventual resettlement or repatriation of all former residents of Vietnam seeking asylum in Hong Kong.

Mr Ho also dealt with the usual sequence of events following the arrival in Hong Kong of Vietnamese boat people during the period when the applicants arrived which is set out in paragraphs 4 and 5 of his affidavit of the 3rd August 1990 which reads where relevant :-

"4. (a) During the period when the Applicants entered Hong Kong, the practice was that the VBP upon their interception by the police and when they were examined by our department staff at Green Island Reception Centre ("GIRC") would be advised that there was a new policy in force in Hong Kong that former residents of Vietnam seeking to enter Hong Kong as economic migrants would be treated as illegal immigrants, and they were free to leave Hong Kong and continue their journey. If so, they would be given food and water, and if necessary their boat would be repaired. Also, they would be advised that if they did not leave Hong Kong and were found to be economic migrants, they would be detained as illegal immigrants pending repatriation to Vietnam.

(b) Upon advice by the police of the arrival of a boatload of VBP, an Assistant Director of immigration is consulted verbally for his verbal authorization for the detention of the boat people under S. 13D(1), Cap. 115. The obtaining of the verbal approval is recorded in a “Record of Verbal Detention Authority from Assistant Director”. The Assistant Director of Immigration (Vietnamese Refugees), short-titled AD(VR), is assigned special responsibility for refugee matters and is normally the Assistant Director authorizing such detention.

(c) The boat people are detained initially at GIRC. Staff from our Department proceed usually within 24 hours to the reception centre to interview the arrivals.

(d) ……..

(e) After the boat people have been interviewed, a detention authorization form is prepared in respect of each individual. In the meantime, written confirmation of the authorization for their detention is obtained from the Assistant Director of Immigration (Vietnamese Refugees). The detention authorization form in respect of each individual together with a covering memorandum is sent to the detention centre(s) where they are detained.

(f) It is usual for the boat people to be kept in GIRC for a brief period before they are transferred to other detention centres for more permanent detention. The Controller of the Refugees Control Centre (C/RCC) of the Security Branch is responsible for the initial allocation of large groups of boat people to various detention centres, whereas the day to day transfers of individual smaller groups of detainees between detention centres is at the discretion of the respective camp managements. The detention centres are variously managed by the Correctional Services Department, the Police and the Civil Aid Services. None of the centres are managed or run by the Immigration Department. It has not been the practice for separate specification to be made when the boat people are transferred between detention centres. The Controller of the Refugees Control Centre is a Chief Immigration Officer seconded from the Immigration Department to the Security Branch.

5. After the initial examination for the purpose of obtaining personal particulars, there is a further series of interviews by Immigration Officers to determine the status of the boat people, i.e. to determine whether they are refugees for the purpose of the Ordinance. If an individual is 'screened in' as a refugee, he would be transferred to Pillar Point Vietnamese Refugee Centre or one of the other 3 open centres which are centres for refugees pending resettlement to third countries. If an individual has been 'screened out' as a non-refugee (he would be placed in one of the detention centres to await his removal), authorization for his further detention pending his removal from Hong Kong is obtained from AD(VR). AD(VR) minutes on file his authorization for the further detention of the individuals concerned."

Evidence of Mr Tran up to and including the screening process

The first applicant Mr Tran and his family arrived in Hong Kong on the 24th March 1989. An oral authorisation or order under s.13D(1) to detain him and his family was made on that day which was later confirmed in writing on the 29th March 1989. They were detained briefly at the Green Island Reception Centre. Subsequently, they were moved to Hei Ling Chau Detention Centre where they were detained until about the 17th September 1989 when they were transferred to and detained in the Whitehead Detention Centre. On the 8th December 1989, they were screened out as non-refugees, and on the 15th December 1989 an order was made to detain then pending their removal from Hong Kong. A review of this decision was sought by Mr Tran but was dismissed.

Evidence of Mr Khuc up to and including the screening process

The second applicant Mr Khuc arrived in Hong Kong with his family on the 6th July 1988, a few weeks after the screening procedure had been introduced on the 16th June 1988. He and his family were also detained initially at Green Island Reception Centre following an oral authorisation and were subsequently transferred to a ferry moored in Victoria Harbour, designated Harbour Reception Centre One. They were later returned to Green Island Reception Centre on the 18th July 1988, transferred again to Harbour Reception Centre One on the 20th July 1988 and from there transferred to Hei Ling Chau Detention Centre. The written authorisation or order under s.13D(1) for the detention of Mr Khuc, and his family is dated the 19th July 1988. At the end of June 1989, Mr Khuc and his family were screened out as non-refugees and an order was made on the 5th July 1989 to detain them pending their removal from Hong Kong. A review was sought by Mr Khuc, but was rejected. On the 7th September 1989, Mr Khuc and his family were transferred to and detained in Whitehead Detention Centre.

Disturbances at Whitehead Detention Centre

Mr Yu Kam-fai, Acting Senior Superintendent of the Correctional Services Department, was in charge of the Whitehead Detention Centre from November 1989 until the 13th May 1990. In his evidence Mr Yu describes Whitehead as a very large detention centre with about 25,000 detainees divided into ten sections. The applicants resided in section 6. Since Whitehead was designated as a detention centre in January 1989, there have been many disturbances and security problems including intimidation of detainees by gangs of other detainees, assaults on and robbery of staff, armed escapes and possession of weapons. In order to minimise friction and to reduce the number of mass fights between people from different regions, the detainees are grouped together according to their area of origin in different sections

of the centre. As at the 30th April 1990, there had been 42 demonstrations which included seven incidents of mass fighting amongst detainees, and 355 reports of crime made to the police that resulted in 114 detainees being convicted of criminal offences by the courts. 6,649 homemade weapons had also been seized. One of the worst sections which had the highest incidents of escape and other disorderly behaviour was section 6.

The situation at Whitehead became very tense in December 1989 when 51 Vietnamese boat people were repatriate mandatorily to Vietnam which resulted in further disturbances. Matters came to a head when there was a major escape from the centre on the 29th April 1990. Two incidents with which the present proceedings have been principally concerned took place on the 12th and 30th April 1990.

Mr Yu said that on the 12th April 1990, a search was conducted for weapons in sections 5 and 6 when the applicants were responsible with other inmates in inciting detainees to prevent members of the staff from taking down a South Vietnam flag that had been hoisted since the beginning of the year. The flag had been viewed as a provocation by a certain group of detainees and as feelings were running high, it was considered necessary to remove it. The staff had repeatedly approached the hut representatives requiring its removal, but they were afraid to do so because of the sentiments involved and possible repercussions. Apart from inciting other detainees, the applicants were also shouting slogans to burn the current Vietnamese flag. The flag was eventually taken down by the staff, but two other flags were hoisted by detainees in defiance of instructions from the staff not to do so. Mr Yu believed that Mr Tran, by virtue of his gestures after the flag had been taken down, was acting under the instructions of a detainee named Nguyen Manh Hung who was described as a notorious gang member. The applicants denied that Nguyen Manh Hung was a member of a gang, but was widely known as “Human Rights Hung”.

Mr Kwok Yuk-ho, an assistant officer of the Correctional Services Department, was responsible for the security of sections 5 and 6, and his duties included gathering information on those persons who had been or were suspected of disrupting the good order and management of the centre. He saw both applicants, during the incident on the 30th April 1990, close to Nguyen Manh Hung when he was speaking through a loudhailer to a large group of detainees. He also saw Mr Khuc speak briefly through the loudhailer. According to his evidence the applicants helped to incite other detainees by waving their arms in protest and leading the shouting of

slogans. He also saw detainees close to the applicants who started to burn the present Vietnamese flag.

Mr Kwok also produced a written statement of Nguyen Xuan Thanh, a member of the peace committee made on the 17th August 1990, that referred to a report made to him on the 12th April 1990. Mr Nguyen states that he saw both applicants on the 12th April 1990 calling upon other boat people to prevent the staff from removing the flag. Mr Nguyen has now returned to Vietnam with the result that it has not been possible to obtain an affidavit or affirmation from him.

After the mass break out from Whitehead on the 29th April 1990 by 102 detainees, most of whom were armed, arrangements were made by the authorities for a joint search operation to take place on the 4th May 1990. The purpose of the search was to look for weapons and explosives and to apprehend and segregate individuals known to have been intimidating and bullying other detainees and instigating disorders within the centre.

Mr Fong Kung-fu, a principal officer of the Correctional Services Department who was in charge of security at Whitehead Detention Centre, upon the instructions of Mr Yu who had in turn received instructions from Mr Raymond Lai, Assistant Commissioner of the Correctional Services Department, compiled a list of detainees who had been causing trouble at the camp which included the names of the applicants following their involvement in the incidents that took place on the 12th and 30th April.

Evidence in the form of two anonymous letters in Vietnamese, the authenticity of which was challenged by the applicants, was produced in which it was alleged that the applicants and Nguyen Manh Hung had organised the burning of the flag on the 30th April 1990 and had incited other boat people in the camp to cause trouble to the Government and camp management. The video tape shows the applicants taking part in the incidents on the 12th and 30th April 1990 and during the search on the 4th May 1990.

The search on the 4th May at Whitehead was conducted by 175 members of the Correctional Services Department and 1,250 police officers using riot control equipment. During the operation, the police met with strong and violent resistance from detainees, particularly from sections 5 and 6 so that teargas had to be used. Inevitably some people were

injured. 2,500 offensive weapons including sharpened water pipes, guard bars and homemade knives were found and removed. Mr Kwok who was present during the search saw both applicants shouting to other detainees through loudhailers to resist the police. Both applicants were arrested and were later transferred to Stanley Prison Detention Centre for detention. Stanley Prison had been designated as a detention centre by the Secretary for Security on the 10th January 1990.

The reasons given for transferring the applicants to Stanley Prison Detention Centre were for the purposes of restoring peace and good order at Whitehead and for good management. It had been intended to transfer the troublemakers to Chi Ma Wan Detention Centre (Upper), but the centre was not ready as conversion work that had to be done for this purpose had not been completed. However, the work was finished soon afterwards with the result that the applicants were transferred and detained there on the 30th May 1990. The applicants were later transferred from Chi Ma Wan Detention Centre (Upper) to Hei Ling Chau Detention Centre on the 13th July 1990 where they have remained until now.

Evidence of the Applicants with regard to the incidents at Whitehead Detention Centre

Mr Tran denies that he has committed any wrongdoing during his detention in Hong Kong and emphasised that he has not been charged with any criminal offence or been the subject of disciplinary proceedings under the Immigration (Vietnamese Boat People) (Detention Centres) Rules, (the Detention Centres Rules). He denies that he was a member of a gang or was a trouble maker and is not aware as to why he was singled out for what he describes as "imprisonment". He has complained about being separated from his family since his transfer from Whitehead and being locked up for long periods in Stanley Prison Detention Centre and Chi Ma Wan Detention Centre (Upper) when he did not have freedom of movement. He further denied allegations that had been made against him of inciting or urging other detainees to resist the police, but that he had endeavoured to have a calming effect.

With regard to the incident on the 12th April 1990, Mr Tran denied inciting detainees in sections 5 and 6 to confront the staff when they were attempting to take down a South Vietnam flag or that he took instructions from Nguyen Manh Hung with regard to the removal of the flag or passed instructions to other detainees to do so.

He referred to the incident on the 30th April 1990, the anniversary of the communist takeover in South Vietnam, as a peaceful demonstration. Anyone who wished to speak could do so and Nguyen Manh Hung and Mr Khuc had used a loudhailer for this purpose. Mr Tran says that he spoke at the meeting about the unfairness of the screening process and that various libertarian anti-communist slogans and chants in protest were uttered. He said that a meeting of this nature was a regular occurrence at the centre and had been allowed by the authorities who had not prohibited peaceful protests. Mr Tran claimed that nothing was said against the camp management or staff and that he did not organise the burning of the flag. He claimed that the meeting was at all times orderly, and after it had finished everybody dispersed peacefully.

Mr Khuc in his evidence generally agrees with the evidence given by Mr Tran. However, Mr Khuc also placed reliance upon his services as a hut representative in the centre from September 1989 to February 1990, during which time no complaints were made about his conduct. Although he agreed that he took part in the shouting, he did not organise any resistance or incite anyone to do so against the camp management or staff. The applicants also said that they took no part in any escape from the centre.

Detention of applicants at Stanley Prison Detention Centre

Both applicants have complained that when they were taken to Stanley Prison Detention Centre, they had their clothes removed, that they were locked in cells for 23 hours a day and were, for the first ten days, kept in the same block as convicted and sentenced prisoners, only separated by iron grilles or gates.

Mr Cheng Chi-leung, Senior Superintendent of Stanley Prison, said the detainees shared the same prison block with prisoners during the first ten days of their arrival, but iron gate partitions were erected between the two parts, completely blocking one part from the other. The entrances to the two parts were separate and the detainees did not meet nor mix with the prisoners. As the transfer of the detainees was an emergency arrangement, it was not possible to make available an independent prison block in time. However, after the first ten days, arrangements were made for the applicants and other detainees to be accommodated in a separate prison block on their own. Although three or four of the detainees had to share a cell at night, the allegation made that they were locked in their cells for 23 hours a day was denied. The detainees were entitled to daily outdoor exercise and enjoyed freedom of movement within the cell block. They were also free to use the bath and toilet facilities. The clothes worn by the

applicants upon their arrival were taken away as they were dirty. However, the clothing supplied to them in replacement was different from that worn by prisoners.

Mr Cheng said that the staff at Stanley have, on a number of occasions, had experience of looking after Vietnamese boat people and have had no difficulty in applying different standards of treatment for inmates of different status under different sets of rules.

Detention of Applicants at Chi Ma Wan Detention Centre (Upper)

Chi Ma Wan Detention Centre (Upper) had been established for the purpose of separating those detainees who had been intimidating and threatening the safety of other detainees and/or subverting the peace and good order of other detention centres where it was not possible to charge them with offences because of the refusal of witnesses to come forward and give evidence against them. It was anticipated that a stricter regime would prevail at the new centre, primarily in order to keep rival factions apart. There was also tighter security to make escapes more difficult. However, it was not intended that it would be used as a penal institution or that it would be managed in any way along penal lines. It would be operated in the same way as the other existing detention centres but with stricter supervision.

Mr Malik, Superintendent of the Correctional Services Department, who was in charge of Chi Man Wan Detention Centre (Upper), said that the applicants, upon admission, were kept in cellular type of accommodation. They had been told in general terms the reasons for their transfer as set out in guidelines and were also informed that if they wished to know the exact reasons they could see him individually. However, neither of the applicants made such a request. Mr Malik said that although the detainees in the centre are subject to slightly greater restrictions on their freedom of movement and to a more organised regime, they are not regarded as prisoners nor treated as such. The applicants were able to wear their private clothing, retain their own valuables and cash, and had access to a canteen where they could purchase various items and were given a choice to work or attend educational or vocational classes. The applicants were also free to mix during recreation, education, dining and work periods with people of their own origin.

Decisions Challenged

The decisions challenged are grouped under four heads. The first is the decision of the Secretary for Security on the 10th January 1990 to designate Stanley Prison as a detention

centre for the detention of persons authorised to be detained under s.13D. The second relates to the initial decisions to detain the applicants upon their arrival at Green Island Reception Centre and their subsequent transfers and detention at Hei Ling Chau and Whitehead, together with the transfers and temporary detention of Mr Khuc at Harbour Reception I and Green Island Reception Centre, together with the decisions to detain them after the screening process pending their removal from Hong Kong. The third relates to the decisions to apprehend the applicants during the search at Whitehead on the 4th May 1990 and the decisions to transfer and detain them at Stanley Prison Detention Centre, Chi Ma Wan Detention Centre (Upper) and Hei Ling Chau Detention Centre; the specification of Stanley Prison as a detention centre and the inclusion of the names of the applicants on the list of detainees who were to be arrested during the search. The fourth relates to the decision of the Director of Immigration made on the 25th May 1990 to delegate his statutory power under s.43(1) of the Interpretation and General Clauses Ordinance, Cap.1 to specify the place of detention of persons under s.13D(1) to public officers in the Correctional Services Department with the rank of Senior Superintendent and above and to the Controller of Refugees Control Centre in the Security Branch.

Grounds for Relief

The following grounds of relief have been put forward on behalf of the applicants:-

1. The decision to designate Stanley Prison as a detention centre under s.13D was unreasonable and therefore void for the following reasons which are taken from the schedule to the re-amended notice of application for leave :-

> "The Secretary for Security failed to have any or any sufficient regard to the following facts or matters:-
>
> (a) Stanley Prison, by its construction, organisation and operation is a penal institution, and is a place where convicted men serve terms of imprisonment; and
>
> (b) The designation of Stanley Prison without the provision of lawful rules and/or procedural directions or guidelines would enable the Superintendent of a Detention Centre in conjunction with the Director of Immigration to avoid Rules made under s.13H(5) of Cap. 115, and

(c) The legitimate expectation of individual detained families to be housed together; and

(d) Stanley Prison is and was then overcrowded; and

(e) The requirement that Stanley Prison (or part thereof) be managed or operated in accordance with Rules made under s.13H(5) of Cap. 115; and

(f) No modification or adaptation of the construction, organisation or facilities of Stanley Prison had been considered, proposed, accepted or carried out in order to accommodate persons detained generally under s.13D(1) of Cap. 115.

By reason of each or all of the above Stanley Prison is and was at the material time(s) an inappropriate place of detention for persons detained generally under s.13D(1) of Cap. 115."

2. The decisions of the Director of Immigration or his subordinates relating to the initial authorisation to detain the applicants at Green Island Reception Centre and their subsequent transfers and detention at the detention centres, up to and including Whitehead and the orders made to detain them after the screening process are challenged on the grounds that the Director or his subordinates failed to comply with the requirements of s.13D(1) or alternatively the decisions were ultra vires as they were outside the powers of the persons who made them.

3. The decisions of the Commissioner for Correctional services and his subordinates relating to the various detentions and transfers with which they were concerned and those relating to the list and the decision to apprehend the applicants are challenged on the grounds that they were ultra vices.

4. The decisions relating to the apprehension of the applicants and their transfers from Whitehead to Stanley and thence to Chi Ma Wan and to Hei Ling Chau and their detention there, the list, the authority and specification of Stanley Prison as a detention centre and the delegation by the Director of his powers to specify the place of detention under s.13D(1) are also challenged on the grounds that they were unreasonable or ultra vires.

Submissions by the Applicants with regard to the decisions to detain and transfers up to and including Whitehead

It was submitted by Miss Li, counsel on behalf of the applicants that every imprisonment is prima facie unlawful and that it is for the person directing the imprisonment to justify his act, see Liversidge v. Anderson [1942] AC 206. Further the protection is not limited to subjects, but extends to aliens, see R. v. Home Secretary ex parte Khawaja [1984] 1 AC 74. This submission is not in dispute.

Miss Li attacked the initial detention of the applicants at Green Island Reception Centre on the grounds that the Director had failed to exercise his discretion under s.13D(1) which uses the word “may” instead of “shall” "be detained" so that detention on arrival should not be automatic for the detention is only required to secure the attendance of a person for a decision to be made on refugee status. Accordingly, she argued that there should have been an investigation into the individual circumstances of the applicants before a decision to detain was made instead of making the orders for automatic detention. She further contended that there was an alternative course available instead of detention in a detention centre by imposing a condition of stay, pending examination under the screening process for residence at an open centre which is also a place of detention.

Miss Li went on to submit that the Director had also failed to specify the place of detention in his authorisation for the detention of the applicants at Green Island Reception Centre upon their arrival, and that there was no power for the specification of the centre by an unidentified officer in charge.

Whilst Mr Marshall, counsel on behalf of the respondents, submitted that the English Prison Act 1952 and the Prisons Ordinance, Cap.234 are in some respects relevant to the interpretation of the Immigration Ordinance, Miss Li argued that the powers contained therein are derived from the sentence of the court or remand in custody by the court so that the general authority to detain is not dependent upon the construction of the Ordinance. She contended that the powers under the Immigration Ordinance must be strictly construed for the Ordinance is dealing with the administrative detention of persons who have committed no criminal offence and who have been subject to no judicial or quasi-judicial process, authorising their detention. Accordingly the powers can only be exercised for the purposes and objects of

the Ordinance and not for any collateral purpose. By way of example, Miss Li said that a policy of administrative detention of Vietnamese boat people for the purposes of deterring others from coming to Hong Kong is ultra vires s.13D and therefore unlawful. Miss Li argued that on a proper construction, s.13D permits detention for the purposes of the Ordinance, but only if the discretion of whether and where to detain is properly exercised and the authority to detain is then limited to the authority to detain in a detention centre specified by the Director.

The powers of the Commissioner of Correctional Services to dispose of a prisoner within the prisons to which the Prisons Ordinance applies does not apply under the Immigration Ordinance, for the place of detention must be specified if Vietnamese boat people are to be detained by the Director. Further, once Vietnamese boat people are detained in a specified detention centre, they are under the legal custody of the Superintendent of that detention centre and not under the control of the Commissioner of Correctional Services so that neither the Commissioner of Correctional Services, and even less his subordinates have power to transfer them to another detention centre. The authority to detain is limited to the authority to detain in the specified place unless and until the Director exercises his discretion in accordance with law to change the place of detention whilst each change requires a fresh authority to detain because detention and the specification of the place of detention are inextricably linked.

<u>Respondents' Submissions on the decision to detain and transfers up to and including Whitehead</u>

Mr Marshall submitted that the intention of the legislature under s.13D is to use the power to detain, at the first opportunity, and to allow Vietnamese boat people to land without any offence being committed under s.38. He said that it is for the police to establish the facts under s.13D that the person intercepted is a resident or former resident of Vietnam with no valid travel documents.

He argued that an order by the Director for detention under s.13D was intended to justify a loss of liberty and stands in the same position as a sentence of the court under s.12(1) of the English Prison Act 1952 from which s.7(1) of the Prisons Ordinance is derived. S.7(1) provides :-

> "Any prisoner sentenced to imprisonment ... may be lawfully confined in any prison. ...".

He Submitted that the section provides a wide and general power of detention and justifies confinement in any prison whilst s.7(2) which is derived from s.12(2) of the Prison Act 1952 reads :-

> "Prisoners shall be confined in such prisons as the Commissioner may direct and may on like direction be removed therefrom during the term of their imprisonment to any other prison".

He submitted that the section is directory for it enables the Commissioner to direct prisoners to prisons and for transfers between prisons at which stage the power is then delegated to the Superintendent of the prison.

Mr Marshall said that in 1982, s.13D was merely a new case of detention engrafted onto the existing framework of the Ordinance and that the scheme did not provide for orders of detention specific to location. Section 35(1) empowered the administrators to detain administrative detainees in any of the particular places generally directed by the Secretary for Security in a statutory instrument. The class of s.13D administrative detainees could be detained lawfully in any of these places by the administrators. By s.35(2), more than one place was specified for classes of detainees and members of that class could be detained in other places. Section 35(2) provides the authority for transfer between detention centres.

Conclusions on Submissions of the Applicants and Respondents with regard to the decisions to detain and transfers up to and including Whitehead

I am quite satisfied that the Director is not required to exercise a discretion under s.13D(1) whether or not to detain Vietnamese who arrive in Hong Kong from Vietnam. Having regard to the policy expressed by Government, the legislature clearly intended that all Vietnamese boat people should be detained immediately upon their arrival. From a practical point of view, the authorities would be faced with an almost impossible task if they had to interview each person upon arrival as to his or her individual circumstances before a decision to detain was made. For a detention order to be made, it is only necessary to establish that a person is a resident or former resident of Vietnam Without a valid travel document. It has been the practice for several years to detain all Vietnamese boat people initially at the Green Island Reception Centre or at one of the substitute reception centres for the purposes of interview, registration and port health clearance. Not only is the procedure well known to the Director and the other Government departments concerned with the control of Vietnamese boat people but

they are also aware that the detention there will be temporary before each person is transferred to another place of detention. The power to specify a place is plainly directory.

The specification is an administrative function that is dependent upon what places are available. The initial authorisation referred to by Mr Cheuk that was intended to cover the subsequent transfers is a perfectly sensible administrative arrangement.

The detention centres in fact are managed by the Correctional Services Department, the police and the Civil Aid Services so that transfers after the initial authorisation will be made by the officer in charge of the detention centre.

In my judgment, the Director is entitled to make an order for detention under s.13D in the same way as a court is entitled to pass sentence under s.7(1) of the Prisons Ordinance and it is unnecessary to specify a particular place of detention. The power to specify a place is, as I have said, directory which enables the Director to specify a particular place if he wishes, but in reality, Green Island Reception Centre had already been specified when the Vietnamese first began to arrive in Hong Kong and it has continued to be so used.

The decision to detain and the subsequent transfers up to and including Whitehead cannot therefore be challenged.

Submissions in respect of the transfers and detention to Stanley Prison Detention Centre, Chi Ma Wan Detention Centre (Upper) and Hei Ling Chau Detention Centre

Before s.13H was passed, giving power to the Secretary for Security to designate any place as a detention centre under s.13D, the only provision available for such detention was under s.35. Miss Li submitted that by virtue of the new framework, s.35 cannot now be used for the detention or transfer of any person under s.13D.

She said that if the power to transfer under s.35(2) was available to the Secretary for Security prior to the introduction of s.13H and the subsequent subordinate legislation, giving effect to s.13H, it cannot have survived afterwards for the clear legislative intent was to set up a separate regime for Vietnamese boat people in separate detention centres subject to their own body of rules. In particular, Miss Li referred to s.13H(5) that enables the Secretary for Security to make rules with regard to powers of transfer between detention centres. Miss Li also

adverted to the fact that certain places of detention were deliberately removed as places listed in the Immigration (Places of Detention) Order made under s.35 and were then designated under s.13H. As a result, if a person is detained under s.13D in one of the places designated under s.13H he could be transferred to a place listed under the Immigration (Places of Detention) Order which was not a designated place under s.13H.

Miss Li emphasised that s.35(1) is preceded by the words “Save as otherwise provided in this Ordinance ...” and s.35(2) by the words “Subject to this Ordinance ...” which therefore precludes reliance upon this section.

Mr Marshall agreed that s.13H impinges on the scheme, but does not replace it. The effect of s.13H is to provide a power of designation of centres specifically for s.13D detainees.

In respect of s.35(2), Mr Marshall said that the words “subject to this Ordinance” which were added in 1982 only affect the power under s.13A to detain in refugee centres which are provided or designated under s.13A(9). He went on to say that if their placing is the subject of a specific provision in the Ordinance, then these words have effect to exclude s.35(2) in the case of detention which was intended, because a substitute provision for s.35(2) is provided in much clearer language by s.13C(4). The same words in s.35(2) do not bite “on the power of detention” enacted at the same time in s.13D because there is no provision for nominating a place except under s.35(1). The introduction in 1989 of s.13H could have resulted in an amendment to s.13D to require detention in a detention centre, but it did not do so. There is nothing in the Ordinance to prevent s.35(2) applying to all detention centres under s.13H and places of detention under s.35(1). Section 35(2) requires an existing lawful place where a class can be detained and another place where they can be detained. This will then allow the Secretary for Security to direct a transfer.

An alternative approach suggested by Mr Marshall to the interpretation of orders under s.13D is that where the Director or persons authorised to act for him do not specify a place of detention, it is to be implied that he is to be detained in any one of those nominated by order under s.35(1). Accordingly, after the 1989 amendment that introduced s.13H the implication would be any place under those nominated by order under s.13H or those nominated under s.35(1).

<u>Conclusions on transfers and detention at Stanley Prison Detention Centre, Chi Ma Wan Detention Centre (Upper) and Hei Ling Chau Detention Centre</u>

In considering the submissions, it is clear that the legislature intended in 1982 to provide for the indefinite detention of former residents of Vietnam pending resettlement under s.13A or removal under s.13D and s.13E. When s.13D was introduced in 1982, only s.35 could be used for nominating a place of detention. Section 13D enabled the Director to select one of the places nominated by the Secretary for Security under s.35(1). The words "otherwise provided" would have applied for the exclusion of s.35(1) when s.13A was amended in 1982 to provide for the detention of Vietnamese refugees in a refugee centre. In 1988, the policy changed so that non-refugees would not be given status under s.13A but would be detained under s.13D, and if not found to be refugees, detained under the section pending removal under s.13E. Further the Ordinance added s.13H which provided for the designation of detention centres for persons detained under s.13D, and administration by one of the three services, the Commissioner of Correctional Services, the Commissioner of Police or the Chief Staff Officer of the Civil Aid Services. However, there is no express power of transfer for detention centres akin to s.13C(4) for closed centres. In effect s.13H provides power for Vietnamese boat people to be placed in special centres which, however, need not be exclusively used as a detention centre although in practice it will be so used under s.13D.

The nub of the submission for the applicants is that the combined effect of s.13D and s.13H is that persons detained under s.13D may only be detained in a detention centre designated under s.13H and places listed in the Immigration (Places of Detention) Order from that time on were not available as places where s.13D detainees could be detained. It was submitted that s.13H(5) has a two-fold effect in that it empowered the Secretary for Security to make rules for the matters provided for and also required him to do so, if he wished to provide for those matters. After the introduction of s.13H, it was submitted that the legislature intended that the Secretary for Security would deal with such matters as transfers between detention centres for reasons of management, security and the other purposes referred in s.13H(5) by way of making rules, and therefore it was no longer open to him to use s.35(2) for the transfer of s.13D detainees.

However, the Ordinance does not provide for the exclusion of s.35 to cases under s.13D for the Ordinance does not provide that a particular class of detainee must be detained in a centre designated under s.13H. The construction placed by Miss Li upon the saving

provisions in s.35 only relate to the changes made to s.13A in 1982 with regard to the power to detain in a refugee centre designated under s.13A(9).

While s.13H gives power for the Secretary for Security to designate any place as a detention centre for s.13D detainees, no amendment has been made to s.13D to require such detention in a detention centre. Section 35(2) will therefore apply to all detention centres under s.13H and the place of detention used under s.35(1). A transfer can then be ordered by the Secretary for Security under s.35(2).

As a result, I accept the submissions made on behalf of the respondents that the transfers to and detentions at Stanley Prison Detention Centre, Chi Ma Wan Detention Centre (Upper) and Hei Ling Chau Detention Centre were validly made under s.35 of the Ordinance.

Designation of Stanley Prison as a Detention Centre

Stanley Prison was designated by the Secretary for Security on the 10th January 1990 as a detention centre for the detention of persons authorised to be detained under s.13D by virtue of s.13H(1) of the ordinance. In the earlier oral decisions that were made to apprehend the applicants and thereafter to transfer them from Whitehead Detention Centre to Stanley Prison Detention Centre, a written authorisation for their detention at Stanley Prison was made by Mr W.Y. Chan, Acting Assistant Director of Immigration on the 25th May 1990. The written authorisation was given in order to avoid any doubt that may have arisen with regard to the earlier oral authorisation for the detention made on the 3rd May 1990. A written authorisation was produced at a hearing before Deputy Judge Gall on the 25th May 1990 when the applicants sought leave for the grant of a writ of habeas corpus to challenge the specification of Stanley Prison as detention centre and for their detention in that institution. However, the application for the writ was refused.

On behalf of the applicants, it has been submitted that there was no power for the Secretary for Security to designate Stanley Prison as a detention centre and that it was therefore ultra vires and further, it was inconsistent with the scheme of the ordinance. It is also alleged that the Secretary for Security failed to take into account the matters set out in the schedule to the re-amended notice of application for leave to apply for judicial review to which I have already referred in the Grounds for Relief.

It was contended that by virtue of those matters, Stanley Prison was an inappropriate place of detention for persons detained generally under s.13D(1).

Miss Li adverted to the combined effect of subsections (5), (6) and (7) of s.13H whereby if the Secretary for Security wishes to provide for the matters set out in subsection (6), he must do so by way of rules, in particular the imposition of punishment and separate confinement, whether by way of punishment, transfer by management and control or otherwise. She submitted that subsection (7) contemplates that if there is a breach of the rules, and it is to be made an offence and a term of imprisonment is to be a penalty or punishment, it must be provided by the rules. The Secretary for Security cannot, therefore, by pass the scheme by designating Stanley Prison as a detention centre so as to enable the Director to specify it as a place of detention for Vietnamese boat people under s.13D. The Director has no role in the treatment and the control of conduct of persons detained under s.13D and the management, security, maintenance of order or discipline in the detention centres or the punishment of offenders. Further, it is inconsistent with s.4 of the Prisons Ordinance which deals with the setting apart of places as prisons for Stanley has been specifically set aside for the purposes of a prison. It was submitted that Stanley cannot cease to be a place set apart as a prison unless and until the Secretary for Security has, by an order published in the Gazette, ordered the discontinuance of the use of Stanley as a prison which had not been done. Miss Li also emphasised that the Detention Centres Rules are a different set of rules to the Prison Rules so a question arose as to which rules should be applied to the applicants when they were detained in Stanley. This argument equally applies to the detention at Chi Ma Wan Detention Centre (Upper).

Mr Marshall in reply submitted that the decision to designate Stanley Prison as a detention centre was a correct administrative decision, particularly having regard to the background that in December 1989, there was a mandatory repatriation to Vietnam. Whitehead Detention Centre was the biggest centre with between 22,000 to 25,000 inmates and it was becoming increasingly ungovernable with resistance being experienced from detainees. Accordingly, for management reasons, there was a need to remove trouble makers.

Whether or not Stanley is a prison is immaterial to the decision for the place can be specified for various purposes as for example Ma Tau Wei Girls' Home which is also used for a place of detention under the Juvenile Offenders Ordinance, Cap. 225; a place for refuge under

the Protection of Women and Juveniles Ordinance, Cap. 213; and as a place of detention under the Immigration Ordinance. He argued that multiple designation is the rule rather than the exception and that if different rules apply, the detainees are kept physically apart as they were in this case. The Prison Rules would apply to prisoners in the prison and the Detention Centres Rules to the Vietnamese refugees.

In my judgment, the Secretary for Security had power under s.13D to designate any place as a detention centre irrespective of the fact that the place was also used for another purpose such as a prison. Stanley Prison was both designated as a prison and as a detention centre and it was a matter for the authorities to determine which part should be used as a prison and which part as a detention centre. It was not necessary to publish in the Gazette the discontinuance of a particular part of the prison which was to be used as detention centre. The only requirement of the authorities was to ensure that arrangements were made, as they were in this case, to keep the Vietnamese boat people physically separate from the prisoners and to apply to them the Detention Centres Rules which would provide no difficulty for the Correctional Services Department.

I accept Mr Marshall's further submission that the applicants have no locus standi to challenge the decision of the Secretary for Security, for although they will be affected by the decision, they have no sufficient interest to challenge what is an administrative decision.

Delegation by the Director of Immigration under s.13D to Specify Places of Detention to Persons Outside the Immigration Service

The delegation by the Director on the 25th May 1990 of his statutory duty to specify the place of detention for persons under s.13D(1) to public officers in the Correctional Services Department of the rank of senior superintendent and above and to the Controller of the Refugees Control Centre in the Security Branch was made under s.43(1) of the Interpretation and General Clauses Ordinance Cap.1 which provides :-

> "43. (1) Where any Ordinance confers powers or imposes duties upon a specified public officer, such public officer may delegate any other public officer or the person for the time being holding any office designated by him to exercise such powers or perform such duties on his behalf, and thereupon, or from the date specified by such specified public officer, the person delegated shall have and may exercise such powers and perform such duties."

Miss Li submitted that the delegation is inconsistent with the scheme of the ordinance and is ultra vires because the authorisation to detain and specification are inextricably linked and an authority to detain is dependent upon a place being specified. Only at that moment when the place is specified do the Vietnamese boat people fall within the custody of the Superintendent of the detention centre to whom they have been committed. The role of the Commissioner of Correctional Services and the Superintendent is confined to the management and control of individual detention centres and no where in the ordinance does the Commissioner of Correctional Services have the right or power to specify, but where it has been necessary for the Commissioner of Correctional Services to have the power to transfer refugees from one centre to another, it has been expressly provided for by the legislature under s.13C(4).

Miss Li submitted that the Director should not have delegated his power to a public officer in another department. However, no authority was cited that precludes such a delegation being made whilst it is highly desirable where several departments are involved and working closely together that the delegation in question should have been made. I do not therefore accept this argument.

Mr Marshall relied on the Carltona principle that was enunciated by Lord Greene M.R. in Carltona Limited v. Commissioners of Works and Others [1943] 2 All ER 560 where he said at 563 :-

> " In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior

> standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

However, those principles which were explained in R. v. Secretary of State for the Home Department Ex p. Oladehinde [1990] 3 WLR 797 do not amount to a delegation of a power or duty, but are concerned with duties and powers carried out by responsible members of the minister's department for whom the minister remains responsible. The Carltona principle is not therefore applicable to this case.

Although an express power is provided under s.2 of the Ordinance for Director to include Deputy Director and any assistant director of immigration, I am quite satisfied that it is not meant to exclude the use of s.43 of the Interpretation and General Clauses Ordinance for the purposes of delegating those powers in the usual way.

I also agree that the decision to delegate was plainly a management decision based upon practical necessity. It was carried out within the framework of the statutory regime so that it is not amenable to judicial review. The applicants may have been affected by the decision, but they do not have a sufficient interest to justify any challenge to the decision. Accordingly I hold that they do not have any locus standi.

If there is a power to transfer, is there a power to transfer for management purposes

Miss Li submitted that without express legislative sanction by way of provision in the Detention Centres Rules, the Secretary for Security could not create a detention centre with a regime such as Chi Ma Wan (Upper) nor designate any prison as a detention centre under s.13H. With this submission, for reasons that I have already given, I do not agree. Further, the Secretary for Secretary could not use any power under s.35(2) in relation to s.13D detainees to effect a transfer for reasons for which the legislature had intended him to provide by way of rules under s.13H(5). Miss Li went on to say that there was no evidence that the Secretary for Security had exercised any power under s.35(2) to direct and specify a place of alternative

detention in respect of any of the transfers of the applicants to the different detention centres where they were detained.

Mr Marshall responded by saying that management purposes means the maintenance of good order. If the Secretary for Security under section 35(2) can direct transfers, a proper purpose must be for maintaining good order. He argued that a governing principle of legal policy underlying the interpretation of the extent and use of this power must be the maintenance of law and order and internal security. The detention of persons, particularly in large numbers, poses internal security risks to the inmates and those charged with detaining them and particularly to the local population if a breakout is threatened. A detention centre out of control threatens the Queen's peace. My attention was drawn to R. v. Dep Gov of Parkhurst ex p. Hague [1990] 3 WLR 1210 which was concerned with the decision of a Prison Governor to transfer and segregate a prisoner under rule 43(1) of the English Prison Rules 1964 which provides :-

> "Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally, or for particular purposes, the Governor may arrange for the prisoner's removal from association accordingly."

Rule 43(1) has no equivalent in the Hong Kong Prison Rules.

In the context of the exercise of discretion, Taylor, L.J. in the case of Hague said at 1260 :-

> "Considerations of public policy may well arise in relation to prison management which would not arise elsewhere. The need to maintain good order and discipline and the need to make speedy decisions often in an emergency are important considerations in the special context of prison management."

Mr Marshall submits that this equally applies to the detention centres for Vietnamese refugees.

In the same case at p.1268 Taylor, L.J. by implication found that it is a proper purpose to use the power of transfer for segregation in another prison. Tudor-Evans, J. in Williams v. Home Office (No.2) [1981] 1 All ER 1211 also approved a transfer between prisons for the purposes of maintaining order.

Although there is no corresponding provision for a transfer between detention centres for management purposes as provided under s.13A(6) with regard to transfers between refugee centres, nevertheless, I accept Mr Marshall's submission that the need for the use of such a power can be implied under s.35(2) which is vital to the administration of peace and good order in the detention centres. I am therefore satisfied that a transfer between detention centres can be made for the purposes of good management and in the interests of security.

Claim that Detention in Stanley Prison Detention Centre and Chi Ma Wan Detention Centre (Upper) was penal

Miss Li claimed that the detention of the applicants in Stanley Prison Detention Centre and Chi Ma Wan Detention Centre (Upper) constituted a harsher regime that was penal in nature.

Mr Marshall submitted that the transfers were made purely for the purposes of maintaining good order and that a harsher regime is not a punishment for offences. The object of the transfers was to preserve order by removing the disruptive influence and to do this effectively by removing the applicants from Whitehead. If they remained, they would be a focal point for unrest and exercise a disruptive influence from a separated area within the centre. It was also contended that in order to prevent future disruption, it was necessary to use a harsher regime to convince the disruptive person not to recommence such behaviour on his return.

In the case of Hague at 1255 Taylor, L.J. had this to say :-

> "Although the consequences of rule 43 are in some respects akin to those impossed as punishment, the object of the rule is not punitive."

Mr Marshall also referred me to Williams v. Home Office (No. 2) [1981] 1 All E R 1211 where a prisoner had been transferred from ordinary prison to a special control unit which had been established at the prison on the instructions of the Secretary of State for Home Affairs as a means of containing and controlling prisoners who were considered to be troublemakers and inducing them to realise that it was in their own interest to improve their behaviour. In the course of his judgment Tudor-Evans J. found that the decision to transfer the plaintiff to the control unit was an administrative and non-punitive decision taken to relieve the prison system.

It was therefore submitted by Mr Marshall that the decision to move the applicants to Stanley and then Chi Ma Wan (Upper) was also an administrative and non-punitive one taken to relieve the detention centre system. On being detained, the only entitlement of the applicants was to be detained according to the rules applicable to each detention centre in which they were detained. The Detention Centres Rules were applied both in Stanley and Chi Ma Wan (Upper).

I have no hesitation in accepting the submission made by Mr Marshall that the transfers were not punitive, but purely as I have said previously for good order and management.

The Right to be Heard and Right to Notice and Reasons

Miss Li contended that the applicants had a right to be heard in respect of the transfers to and the detention in Stanley and Chi Ma Wan (Upper) because of the penal effect on them of the transfers, and that they had received no warning that further participation in any form of political protest would lead to a transfer to a harsher regime in these institutions with a separation from their families. The argument advanced that the applicants had a legitimate expectation that they could engage in peaceful protests and could expect to remain with their families and to have free association was however wholly misconceived. The maintenance of peace and good order clearly takes priority over any right remain with the family or to have freedom of association whilst there was no legal basis for the contention that the applicants could indulge in peaceful protests in the absence of any express permission for them to do so.

In the circumstances of this case, when a dire emergency had arisen it would have been impracticable to give the applicants a right to be heard, and as the detention was not penal in nature, but purely for management purposes to ensure good order, I am quite satisfied that the applicants were not entitled to be heard nor were they entitled to any notice or reasons. However, reasons were subsequently given to the applicants by Mr Malik.

False Imprisonment

It was submitted by Miss Li that if the detentions under s.13D are held to be bad, the applicants are entitled to claim damages for false imprisonment. She argued that the rights of the applicants as s.13D detainees are the same as all persons in Hong Kong except so far as they are expressly or by necessary implication removed by the Ordinance and the Detention Centres Rules. The impairment of residual liberty by further imprisonment in the wrong place or

otherwise in breach of the Detention Centres Rules amounts to a trespass to the person, see Cobbett v. Grey [1850] 4 Ex 729 where Parke, B. at 736 said :-

> "The removal of a person from one part of a prison to another, in which by law he ought not to be confined, is prima facie a trespass".

The matter of physically intolerable conditions to support an allegation of false imprisonment that was referred to in the cases of Weldon v. Home Office [1990] 3 WLR 465 and Middleweek v. Chief Constable of Merseyside [1990] 3 WLR 481 is not relied upon by the applicants.

The argument for the applicants is based upon a significant reduction of the residual liberty of the applicants in the new place of detention which it is alleged constituted an unlawful imprisonment and a trespass to the person.

Mr Marshall submitted that the issue of false imprisonment cannot apply to a person already detained for it is an interference of a free person to go where he likes and it is not concerned with a mere partial interference of freedom of locomotion. He therefore contended that an order for detention under s.13D operates as a defence to an action for false imprisonment brought by the applicants. It affords a defence to the respondents whether the action is brought against the Secretary for Security and the Commissioner of Correctional Services in respect of confinement in a detention centre or in respect of a vicarious liability for the acts or defaults of particular officers. The detention of a prisoner under section 12(1) of the Prison Act 1952 is not rendered unlawful by any variation in the regime or in the conditions of his confinement. Indeed, what happens to the prisoner whilst he is in prison is regulated by the prison rules. Parliament by main and subordinate legislation has created an internal statutory regime for the treatment of prisoners. Breach of the prison rules does not and cannot give rise to an action of or claim in private law for false imprisonment. To conclude otherwise would be contrary to well established authority to the effect that no private law cause of action lies in respect of a breach of the prison rules, see Becker v. Home Office [1972] 2 QB 407. Mr Marshall contended that the position is the same under the present statutory framework for the detention of Vietnamese refugees. If it is accepted that a prisoner or detainee enjoys a residual liberty within the prison or detention centre or that such a right arises from any other legal source, Mr Marshall submitted that such a conception can have no wider reach or meaning than the prisoner’s or detainee’s legal rights as described and the suggestion begs the question whether the rules can give rise to a cause of action at law.

Mr Marshall submitted that it is wholly consistent with the applicants' case that the statutory and administrative regime should, as it does, recognise and give effect to the interest of the detainees. Their rights are subject to the internal law of the detention centre consituted by the Ordinance and rules and the right to petition the Governor.

If an applicant complains of an assault or battery, he may sue in respect of those matters, or if there has been an interference with residual liberty without justification, the prisoner may have a claim for damages in the tort of misfeasance. There are, therefore, ample safeguards under the common law and under statute to protect the detainee in respect of any unjustifiable interference with his residual liberty. Reliance was placed by Mr Marshall upon the following passage of Tudor-Evans J. in Williams v. Home Office (No.2) [1981] 1 All ER 1211 where at 1240 and 1241 he had this to say :-

> "Section 12(1) of the act empowers the Secretary of State lawfully to confine a prisoner in any prison. Counsel for the plaintiff submits as I understand him, that the subsection is concerned only with the place of imprisonment and not with any tortious act done within it. This means that the subsection is not capable of justifying the detention of a prisoner when the nature of the imprisonment differs from that in the remainder of the system and where there is a breach of the Prison Rules.
>
> In my judgment, the sentence of the court and the provisions of s.12(1) always afford a defence to an action of false imprisonment. The sentence justifies the fact of imprisonment and the subsection justifies the confinement of a prisoner in any prison. How then can it be unjustifiable and unlawful to confine him there? I accept the submission of counsel for the defendant that the sentence of the court and the provisions of s.12(1) provide a defence to this action, ..."

Mann, J. in R. v. Board of Visitors of Gartree Prison Ex Parte Sears The Times 20th March 1985 applied the reasoning of Tudor-Evans J. in Williams v. Home Office (No. 2) and held that a variation in the conditions of confinement of a lawfully detained prisoner could not constitute the common law tort of false imprisonment whether the variation in conditions of confinement was as a result of a managerial decision of the Governor or a determination of the Board of Visitors which could be flawed for want of jurisdiction.

Safe guards are provided in respect of administrative detention under s.53 of the Ordinance for the Governor in Council to review decisions of public officers whilst r.6 of the Detention Centres Rules provides for visits by Justices of the Peace and r.7 for visits by visitors interested in the welfare of detainees such as the United Nations High Commissioner for Refugees.

The applicants' rights whilst in detention are limited to the residual rights for a claim for assault or battery, personal injury arising as a result of negligence and any claim for damages for misfeasance, see Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food [1986] QB 716.

In my judgment, the order for detention under s.13D affords a complete defence to an action for damages for false imprisonment.

Conclusions

Although Vietnamese boat people are in practice treated as illegal immigrants, Miss Li contended that by virtue of the deeming provision in s.38(2) of the Ordinance to the effect that they are deemed not to have landed provided that they undergo the examination under s.4(1)(a), placed their status in a grey area or in limbo. Mr Kat, junior counsel for the applicants, went even further when he submitted that they were lawfully in Hong Kong, having been given permission to remain in detention. In another submission, it was contended that the applicants had not consented to the present regime of screening as set out in the notice, ex.CL-3, for the notice that was read to the applicants or was in force at the time of their arrival, ex.CL-2, misrepresented the true position in law and fact so that they did not have a genuine option when they arrived in Hong Kong apart from sailing on. It was submitted that the applicants by reason of the policy of first asylum had a legitimate expectation of a right to enter Hong Kong for that purpose, and in the case of Mr Khuc, taking into account the policy in force at the time of his arrival before the screening policy was introduced, that he had a legitimate right to be admitted as refugee. To say the least, these were startling propositions and remarkable for their audacity. However, s.38(2) merely renders inoperative the power to prosecute for an offence under s.38(1) for landing in Hong Kong unlawfully. It does not give any legitimacy to the presence of the applicants who have no lawful right to land unless and until permission has been granted for this purpose. Consequently, their presence here is unlawful.

Although Miss Li disagreed with the analogy drawn by Mr Marshall with the prisons legislation and the authorities cited with regard to prisoners, I consider that such an analogy is wholly appropriate. The applicants, as I have said, are present in Hong Kong unlawfully and if it had not been for the deeming provision in s.38(2), could have been prosecuted for landing unlawfully in Hong Kong under s.38(1) which carries a maximum penalty on conviction of a fine of $10,000 and three years imprisonment. Accordingly, in my judgment, the rights of the applicants fall to be considered in the same way as that of a prisoner subject to the rights conferred under the Immigration Ordinance and the rules applicable to detention centres. The decision in Hague to which I have referred, is therefore particularly relevant to this case.

Apart from the highly technical arguments that were directed to the validity of the powers exercised under the Immigration Ordinance which I have held were unfounded, the main thrust of the applicants' case has been about the unfair conduct of the authorities in selecting them for apprehension and their subsequent transfers and detention in Stanley Prison Detention Centre, Chi Ma Wan Detention Centre (Upper) and Hei Ling Chau Detention Centre.

The facts reveal that Whitehead Detention Centre had almost been reduced to a state of anarchy with the result that the authorities had to take stern measures in order to restore peace and good order. One of the steps to be taken was to remove the disruptive and intimidatory influence of the detainees, including the applicants who were known to be troublemakers. The applicants contend that they are innocent and have been singled out unfairly. However, the authorities, quite naturally, are not required to establish the allegations against the applicants to the degree of proof required in a criminal trial, but are entitled to act upon evidence that gives rise to a reasonable suspicion that they were involved in the disturbances. Both Mr Yu and Mr Kwok were eye witnesses to some of the applicants' conduct whilst there were the complaints made in the two anonymous letters, the statement of Nguyen Xuan Thanh and the video tape. There was indeed abundant evidence in the hands of the authorities that justified the inclusion of the names of the applicants on the list of those persons who were to be arrested. The decisions to remove the applicants and for their detention at the other detention centres were neither unreasonable nor unlawful. The decisions were not intended to be punitive although the result can be regarded as such having regard to the stricter regime that prevailed. However, that was an inevitable consequence attributable to the conduct of the applicants. It was necessary for good order and management to remove the unruly

elements to restore peace to the camp. When they were removed, the applicants were not mixed with the ordinary Prison population at Stanley, but were subject to their own discipline under the Detention Centres Rules.

The argument put forward that the authorities should have either charged the applicants with a criminal offence or proceeded to use the Detention Centres Rules for disciplinary proceedings was unrealistic for in the circumstances of this case, they were re required to act quickly in an emergency. Further, the authorities were in any event not obliged to adopt either of these courses for their discretion cannot be fettered in such a situation. The alternatives were in fact considered, but the difficulties likely to be encountered in finding witnesses and the fear of retaliation from the persons charged in respect of anonymous complaints were matters to be taken into account in not adopting an alternative course.

However, even if the applicants were innocent of the complaints alleged and a mistake had been made in singling them out, it would not have justified a challenge to the decisions by way of judicial review unless the authorities had acted unfairly and in breach of the rules of natural justice. Upon the facts of this case, the authorities have not been shown to have acted other than in good faith upon evidence that raised a strong suspicion that the applicants were trouble makers.

At its highest, all that this case has been about was the detention of the applicants at Stanley Prison Detention Centre for a period of just under four weeks and at Chi Man Wan Detention Centre (Upper) for a period of six weeks. No complaint has been made that the applicants were subjected to intolerable living conditions or suffered any maltreatment. The applicants are now living on their own at Hei Ling Chau Detention Centre without their families which is entirely their own fault as it was believed that the detention there was unlawful. As I have said there was no Justification for this view.

If I had held that there had been a breach of the procedures or a breach of the rules of natural justice where applicable, I am quite satisfied that no injustice has been suffered by either of the applicants. Accordingly, in the exercise of my discretion, I would in any event have refused to grant any of the relief that has been claimed, see R. v. Monopolies and Mergers Commission ex parte Argyll Group Plc. [1986] 1 WLR 763, R. v. Panel on Takeovers ex parte Datafin Plc. [1987] QB 815 and R. v. Panel on Takeovers ex parte Guinness Plc. [1990] QB

146. The final result of this case, in any event, would have resulted in the applicants remaining in detention.

Judicial review is concerned with the abuse of power or jurisdiction or an abuse of a discretion or a breach of the rules of natural justice. In this case there has been no abuse nor any breach of the rules of natural justice.

It is therefore a matter of some concern that the two applicants who came to Hong Kong illegally and have been screened out as economic migrants have been permitted to bring these proceedings at the taxpayers' expense. Not only did they challenge the legality of their detention, as I have said, on highly technical and specious grounds, but they have also claimed, without any justification, damages and exemplary damages for assault and false imprisonment. In fact the activities of the applicants at Whitehead fully justified the actions that were taken by the authorities to remove them and to detain them elsewhere.

In my judgment, these proceeding were wholly unmeritorious and were tantamount to an abuse of the process.

The motion will be dismissed.

(B.L. Jones)
Judge of the High Court

Representation:
Miss Gladys Li, Q.C. and Mr N. Kat (Boase & Cohen) for Applicants
Mr W.R. Marshall, Q.C. and Mr A. Wu (Attorney General's Chambers) for Respondents