IN THE COURT OF APPEAL

1997, No. 42, 51, 56, 62 and 71
(Civil)

- HEADNOTE -

Administrative law - Habeas corpus proceedings brought by 1,376 Vietnamese migrants held in detention under s13D(1) Immigration Ordinance pending removal to Vietnam - High Court judge had found upon the evidence that generally-speaking the Director of Immigration had satisfied him that, having regard to all the relevant circumstances (including those set out in s13D(1A)(b) of the Ordinance), the periods under which the applicants were detained were not unreasonable - The judge nevertheless ordered the release of four applicants.

Held (Court of Appeal) reversing the judge:

(1) On the written case as formulated by the applicants, and on the basis of the judge's findings on that case, the applications should have been dismissed. Moreover, on the judge's own findings, the detention of all of the 12 "test" applicants was, to a larger or lesser extent, "self-induced".

(2) The judge should not have embarked upon a roving inquiry outside the frame-work of the applicant's case, picking up evidential points along the way and making that the basis of his judgment: The microscopic examination by the judge of aspects of the evidence relating to individual cases could not, consistent with good administration, have been conducted by the Director of Immigration: The supervisory jurisdiction of

the High Court under Order 54 RSC was never intended to be used in this way.

(3) The "Hardial Singh principles" referred to in *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1997] AC 97 must be applied with discrimination flexibility and commonsense: When those principles speak of "all reasonable steps" to effect removal of Vietnamese migrants from Hong Kong they do not envisage flawless administration: In dealing with the mass movement of people across national boundaries clerical mistakes will, in the nature of things, occur.

(4) The legislature is, subject to the proper application of the *Hardial Singh* principles as relevant to Hong Kong, entitled to pursue the policy of administrative detention for Vietnamese migrants and it is not the function of the courts by over-subtle interpretations of the law to frustrate it. Normally a change of policy - such as the conditional release of detainees pending compulsory return to Vietnam - would be preceded by public consultations and debate in the legislature. The courts should not seek to force a change of policy by judicial intervention: "If the wheels of justice had been able to spin at the push of a button, it would have meant, on the applicants' case, that something like 4,000 people (young, old, able-bodied and infirm) would have been released at the stroke of the judge's pen."

(5) Courts have to be sensitive to the requirements of good administration, which ensure that the rights of *all* individuals - as opposed simply to those with the good fortune of having

access to lawyers and are able to institute legal proceedings - are respected.

(6) Section 11 of the Hong Kong Bill of Rights Ordinance excluded the application of the Bill of Rights to the applicants in respect of the legality of their detention in Hong Kong.

(7) The order for discovery made by the judge against the Director of Immigration was in the nature of a “fishing expedition” and contrary to Order 24 r13(1) RSC and must be set aside: Likewise the judge’s order for “rolling affidavits” at the rate of 50 applicants a week.

IN THE COURT OF APPEAL

1997, No. 42, 51, 56, 62 and 71
(Civil)

BETWEEN

VO THI DO AND 854 OTHERS	Applicants (Respondents)
and	
THE DIRECTOR OF IMMIGRATION THE SUPERINTENDENT OF WHITEHEAD DETENTION CENTRE (Civ. App. No. 42/97)	Respondents (Appellants)

CHIENG A LAC AND 3 OTHERS	Applicants (Respondents)
and	
THE DIRECTOR OF IMMIGRATION THE SUPERINTENDENT OF WHITEHEAD DETENTION CENTRE (Civ. App. No. 51/97)	Respondents (Appellants)

VO THI DO AND 854 OTHERS	Applicants (Appellants)
and	
THE DIRECTOR OF IMMIGRATION THE SUPERINTENDENT OF WHITEHEAD DETENTION CENTRE (Civ. App. No. 56/97)	Respondents (Respondents)

VO THI DO AND 652 OTHERS	Applicants (Respondents)
and	
THE DIRECTOR OF IMMIGRATION THE SUPERINTENDENT OF WHITEHEAD DETENTION CENTRE (Civ. App. No. 62/97)	Respondents (Appellants)

VU VAN PHAN, VU NGOC TINH, PHUNG NGOC THIN, LY VI VIEN — Applicants (Appellants)

and

THE DIRECTOR OF IMMIGRATION
THE SUPERINTENDENT OF WHITEHEAD DETENTION CENTRE — Respondents (Respondents)

(Civ. App. No. 71/97)

Coram: Hon Litton V-P, Mayo and Ching, JJ.A. in Court
Date of hearing: 14-16 May 1997
Date of handing down judgment: 18 June 1997

J U D G M E N T

Litton V-P, giving the judgment of the Court:

There are five consolidated appeals before us: Three interlocutory (CA 42/97, CA 56/97 and CA 62/97) and two substantive (CA 51/97 and CA 71/97). They all arise from an application lodged in the High Court on 13 November 1996 on behalf of 1,376 applicants, former residents of Vietnam, for writs of habeas corpus.

The applicants' case

The written application (in the form of a "Case") states that some of the applicants are heads of families. The application therefore represents "an estimated 4,000 family members who are detained in Hong Kong." The application goes on to say "with the exception of a handful of relatively recent arrivals, all the Applicants have been detained for between 5 and more than 8 years."

The general ground for the applications for writs of habeas corpus is put in this way:

> "The Applicants are detained under s13D(1) of the *Immigration Ordinance* which empowers the Director of Immigration to detain residents or former

residents of Vietnam and their children 'pending removal'. The Applicants are those asylum seekers who have only been detained for such extensive periods of time, but who the Director of Immigration is unable to remove at the present time because Vietnam does not permit the Director to do so."

The application then goes on to list the names of the applicants. They are divided into three categories. Paragraph 4 of the application states:

"4. While each of the Applicant categories has certain characteristics that differentiate them, each of the Applicants contend that their detention is unlawful on the same grounds, set out in detail further below. The categories of Applicants are:

(1) Those ethnic-Chinese Applicants who were registered and regarded as aliens in Vietnam, or whose immediate family members were so registered, and who allege that they are not permitted to return to Vietnam.

(2) Those who were not registered as aliens in Vietnam, but who despite having been cleared by Vietnam have not been permitted to return when either they applied for voluntary repatriation or when the administration attempted to forcibly remove them.

(3) Those who have not been cleared for return and are accordingly not permitted to do so under either the voluntary or forced repatriation schemes."

Para 4(1) above is what might be described as the "nationality issue". Paras 4(2) and (3) raise the "delay issue".

The grounds of application are then further elaborated upon in this way:

"7. The Applicants allege that their detention is in no way 'self-induced' within the meaning of the Privy Council's decision in *Tan Te Lam and Others v The Director of Immigration and Others*. Individual Applicants from within each of the categories have applied for voluntary return. Their return, however, has not been effected. Each of the Applicants' claims to be detained unlawfully on the following grounds:

(1) Their detention serves no legitimate purpose in violation of Article 5(1) of the *Hong Kong Bill of Rights Ordinance*, Cap 383, which prohibits arbitrary detention.

(2) Their detention for such prolonged periods with an indeterminate period of detention to follow constitutes 'inhuman or degrading

treatment or punishment' in violation of Article 3 of the *Hong Kong Bill of Rights Ordinance*.

(3) Their detention is unlawful within the terms of the decision of the Privy Council in *Tan Te Lam and Others* and other cases in the *Hardial Singh* line of authorities in that they have already been detained for an unreasonable period in all the circumstances of their cases.

(4) Their detention is unlawful within the meaning of the decision of the Privy Council in *Tan Te Lam and Others* and other cases in the *Hardial Singh* line of authorities in that the machinery of removal has stalled because Vietnam does not permit their return and their prospective periods of detention are unreasonable.

A. In respect of the Applicants who are not considered to be nationals and who, under current Vietnamese government policy, are not permitted to return, the purpose for which the orders for their detention were made cannot be achieved.

B. In respect of the Applicants for whom there is no Vietnamese government policy known with certainty to the Applicants not to accept them *per se*, but who are subject to a Vietnamese policy not to accept them at the present time for any of a variety of reasons, the machinery of removal has stalled and the purpose of their detention has similarly been spent. The purpose for which the orders for their detention were made cannot be achieved. If there comes a time when the Vietnamese authorities do accept these Applicants for return, only then will the power of detention be revived because the purpose for which the orders for their detention were made can be achieved.

(5) Their detention is unlawful within the terms of the decision of the Privy Council in *Tan Te Lam and Others* and other cases in the *Hardial Singh* line of authorities in that the Hong Kong administration has not taken all reasonable steps to facilitate their early return to Vietnam and in several ways has delayed their repatriation.

8. The Applicants each seek their release from detention until such time as the Vietnamese or some other government accepts them. They do not seek permanent residency status in Hong Kong in these proceedings. In the case of others who have been released, they have remained at liberty on recognizance unless and until the Vietnamese government has accepted their return, as has happened in a small number of cases."

The last statement (para 8) is significant. What the applicants (or, more accurately, their lawyers) say in effect is this: The process of removal to

Vietnam in relation to the 4,000 people comprised in the application has "stalled" (as averred in para 7(4) above). Hence the Court should intervene and order that the applicants be forthwith set free: Free, that is, *conditionally*; to remain "at liberty on recognisance", subject to such conditions as the Director might lawfully impose: To be re-detained when the Vietnamese government has accepted them for return to Vietnam. The practical implications of all this will require closer scrutiny later on.

With regard to the question of *delay* paras 89 and 90 of the applicants' Case say:-

> "89. The Director of Immigration has thus far refused to provide copies of correspondence with the Vietnamese authorities in relation to any of the Applicants and the attempts being made to effect their removal. The Applicants seek to put the Director to the test of proving to a high civil standard that he has taken all the appropriate steps in a timely manner. These steps include:
>
> (1) Negotiating with the Vietnamese authorities over the repatriation of each of the Applicants, particularly those who the administration is aware (or should be aware) will or may well pose a problem in terms of agreeing their repatriation with the Vietnamese authorities and those who have been specifically brought to the attention of the administration.
>
> (2) Negotiating for the repatriation of Vietnamese asylum seekers by forced repatriation. The Orderly Departure Programme (forced repatriation) only came into effect in November 1991. Before that time there was no forced repatriation.
>
> (3) Negotiating a higher rate of forced repatriation than has been the case. Up to 1995, only 65 people were forcibly returned every 6 to 8 weeks. There have been reports that it was open to the administration to repatriate forcibly that number of people every month, pursuant to an agreement with Vietnam. Since then forced repatriation has gradually risen to the point where now, the administration claims to have the agreement of Vietnam to forcibly repatriate 1,000 asylum seekers each month. It is not clear if this number is being met or that it cannot be raised through the efforts of the administration.
>
> 90. The Applicants further assert that the Director of Immigration has delayed their removal in three ways:
> (1) The Director's failure to begin early and intense negotiations.

(2) A priority system under which people who have been detained longer than others are pushed to the back of the removal queue.

(3) The administration's decision not to remove anyone for a period of six months in 1994."

As can be seen from the applicants' Case - and the point requires emphasis - the way the applicants sought to raise a *prima facie* case of illegality against the Director of Immigration was to aver, in effect: (i) That the applicants (or some of them) fell outside the class of persons acceptable for repatriation to Vietnam (the "nationality issue"); (ii) the system of repatriation was such that inordinate and unacceptable delay has ensued; and (iii) in any case the system was unfair.

Global approach

Inevitably, the way in which the judge dealt with the applications at the first hearing was dictated by the way the Case for the applicants was framed: namely, that their detention, as at the date of the applications, was unlawful on the broad grounds set out in the Case. Hence, when the application went before Keith J on 19 November 1996 the proposal was put forward by counsel that 12 test cases be selected for hearing: the intention being that the determination of the issues in those cases would enable the parties to resolve the bulk of the remaining cases by agreement: this would be so because, as averred in the Case, the applicant's grievances fell into three broad categories, and the 12 'test cases' covered all those categories.

On 19 November 1996 Keith J made the order as sought: that 12 "test cases" be heard in early January 1997 and that the applications in respect of the remainder should be adjourned *sine die* and he gave directions with regard to the filing of evidence. The reasons for the 12 test applications were explained by the judge thus:

> "*The Applicants' advisers had always accepted that it would not be possible to consider individually the cases of all the Applicants*. Their suggestion was that the cases of a handful of the Applicants be heard and determined first. Those Applicants would be as representative as possible of any sub-groups which might exist amongst them, because the aim was to enable the decisions in the cases of these Applicants to be as reliable a guide as was possible to the likely outcome of the cases of the other Applicants. In the event, 12 test Applicants were selected by the parties, and that was reflected in the order I made on 19th November. I directed that the hearing of the applications of those 12 Applicants should take place first, and I adjourned the hearing of the applications of the other Applicants sine die." (Emphasis added).

Hearing before Keith J

The hearing of the 12 "test applications" took place before Keith J between 7 and 27 January 1997. He gave judgment on 5 February 1997. By that time, things on the ground had shifted. Far from the machinery for removal of the applicants having "stalled", as averred in the Case lodged on 17 November 1996, many of the original applicants had been repatriated to Vietnam in the meanwhile: including four of the 12 "test applicants". Of the remaining eight, one applicant (A526) had dropped out of the picture because his status as a non-refugee was being re-examined.

Of the remaining seven, the judge ordered the immediate release of four: This gave rise to the Director's appeal in CA No. 51/97. The judge dismissed the applications of three: they became appellants in CA No. 71/97.

As regards the original applicants whose cases were generally adjourned on 19 November 1996, the position had, as mentioned earlier, changed on the ground. By the time the judge gave judgment on 5 February 1997, over 460 applicants and their families, out of the original 1376, had been repatriated to Vietnam. The judge gave them leave to withdraw their applications for writs of habeas corpus. As regards the remaining applicants, the judge ordered the Director of Immigration to produce to the applicants' solicitors "as soon as possible and on a progressive basis" copies of four classes of documents: these being:-

(1) The forms completed by officers of the Immigration Department upon the Applicants' arrival in Hong Kong and any documents produced by the Applicants and referred to in those forms.

(2) The records of the Applicants' screening interviews and all documents produced by them to officers of the Immigration Department.

(3) All communications sent to the Government of Vietnam seeking clearance for the return of the Applicants to Vietnam.

(4) All communications from the Government of Vietnam or the UNHCR responding to the requests for clearance.

The Director, being dissatisfied with this order, lodged his appeal in CA 42/97. This order for discovery was, however, stayed by order of Yeung J on 24 February 1997 pending appeal. The applicants appealed against this stay in CA 56/97.

The next move in the proceedings was an application by the Vietnamese migrants heard on 17 March 1997 resulting in the following orders:

(i) The Director of Immigration to file affidavits in respect of each of the remaining applicants at the rate of 50 per week, with the first batch to be filed by 4.30pm on 27 March 1997;

(ii) There be liberty to the Director to apply to have this order set aside in the event of her being willing to produce to the applicants' solicitors copies of the documents ordered to be produced on 5 February 1997.

On 21 March 1997 the Director appealed against this order: CA 62/97.

A few days later a single judge of this court ordered the consolidation of the interlocutory appeals and a stay of the judge's order regarding the filing of affidavits by the Director.

Civil Appeals No. 51/97 and 71/97

As earlier mentioned, in respect of the 'test applicants' still in Hong Kong, the judge, by his judgment of 5 February 1997, granted writs of habeas corpus in four cases and refused the applications in three.

By the time the appeals opened before us on 14 May, the situation had once more changed. Nguyen Thi Bich Huong (A15), respondent in CA 51/97, was cleared by the Vietnamese authorities for repatriation and was removed by the Director on 21 March. Likewise Mai Thi Lan (A909) respondent in CA 51/97: she left Hong Kong in February, shortly after Keith J's judgment ordering her release. Thus, although there were originally four Vietnamese migrants who were respondents to the Director's appeal in CA 51/97, by the time we heard the Director's appeal there were only two: Chieng A Lac (A1) and Nguyen Van Thanh (A336). They had been put on recognisance upon their release from detention, pursuant to the provisions of s13D(1C) of the Immigration Ordinance: a condition of the recognisance being that they reported periodically to the Director of Immigration. Miss Gladys Li QC, their counsel, accepts that if they should be cleared for return to Vietnam then their re-detention for that purpose would be lawful under s13D(1) of the Immigration Ordinance. They were interviewed recently by the Vietnamese team resident in Hong Kong: In the case of A1 in April; and in the case of A336 in March, after Keith's judgment but before the appeal opened before us.

We are accordingly in this curiously fluid situation that if, before we give judgment on the Director's appeal, these two respondents are cleared for repatriation and re-detained, then the entire appeal in CA 51/97 would have

been a mere academic exercise. Counsel have not been able to cite to us any instances in the common law world where the legality of detention shifts in and out of the shadows in this transitory way. It immediately calls into question the fundamental correctness of the judge's approach.

As regards the migrants whose applications for habeas corpus were dismissed by the judge, another has, since the date of the judgment, been cleared for return to Vietnam and has been since repatriated. There are accordingly only two appellants left before us, represented by counsel. They are Phung Ngoc Thin (A867) and Ly Vi Vien (A954). A867 was interviewed recently by the Vietnamese delegation.

The net result of all this is that, by the time this judgment comes to be delivered, there may be no migrants left in Hong Kong as parties to the substantive appeals, CA 51/97 and CA 71/97, on whom any order we make might bite. If this were so, it follows that the interlocutory appeals become academic as well.

The twelve cases considered by the judge were selected as 'test cases', upon the assumption that there were common issues (such as the "nationality issue") the resolution of which would go a long way to resolving the remaining cases. That was how the case for the applicants was framed. But that was not the way the test cases were argued by counsel Miss Gladys Li QC and the judge did not determine the applications in that way. He focussed upon the individual circumstances of the particular applicants, so far as he was able to do so upon the material before him, and granted - or refused - relief on that basis. So the 'test cases' tested nothing at all - except perhaps the resources of the Immigration Department mobilized to deal with this case, and the ability of the High Court to cope with applications presented in this manner.

How the case changed shape

It was never the case for the applicants (as formulated in the Case) that their *initial* detention under s13D(1) was unlawful: although, by the time it came to be *argued* by counsel before Keith J it had changed shape. Their case as formulated on paper was that whilst their detention pending removal from Hong Kong was initially lawful, it *became unlawful* after a certain time because of *delay* in their repatriation. That was the case which the Director met by affidavits filed on her behalf. The point is summarized in this way in the Case (para 7(5)):

> "(5) Their detention is unlawful within the terms of the decision of the Privy Council in *Tan Te Lam and Others* and other cases in the *Hardial Singh* line of authorities in that the Hong Kong administration has not taken all reasonable steps to facilitate their early return to Vietnam and in several ways has delayed their repatriation."

As to this, it will be recalled that it was put in three ways (para 90 of the Case):

(1) The Director had failed to "begin early and intense negotiations";

(2) the "priority system" was flawed;

(3) there was a period of six months in 1994 where no removal took place.

As to point (2), the "priority system" point, it was not pressed before the judge. In his judgment (p39-p40) he said:

> " It was contended on behalf of the Applicants that one would have expected the order in which the particulars were submitted to follow the same order in which the detention orders pending removal were made. An examination of the dates on which the particulars of some of the test Applicants were submitted shows that the particulars were not submitted in that order. As it is, there is no evidence before me as to the criteria which determined the order in which particulars were submitted. As in *Chung Tu Quan*, the Director has not been pressed to identify the Immigration Department's criteria. Had she been

> pressed to do so, I suspect that I would have required her to, even though the Respondents were reluctant to do so at the time of *Chung Tu Quan*. However, since the Director has not been pressed to do so, I am not prepared to assume that unfair criteria have been adopted or that the criteria which have been adopted have not been applied fairly or consistently.
>
> I should add that this view is not affected by the little I know about the system of priorities agreed between the Governments of Vietnam and Hong Kong when the Orderly Repatriation Programme was agreed. That provided that 'double backers' (i.e. those who had already been repatriated to Vietnam under the Voluntary Repatriation Scheme but had returned to Hong Kong) would be returned first, and that those who arrived after the Orderly Repatriation Programme was in place would be returned next. What I do not know is the order in which the particulars of non-double backers who arrived before November 1991 are submitted. All but one of the test Applicants come into that category."

So the point, in effect, fell away.

As to point (3), regarding the events of 1994 in Whitehead Detention Centre, there were serious disturbances in April of that year resulting in all ORP operations being suspended pending the report of an independent inquiry. As a result there were no forcible repatriations for several months. This was plainly a "circumstance" beyond the Director's control, affecting the applicants' detention which properly weighed in the scales, in terms of s13D(1A)(b)(i) of the Ordinance, when the judge came to consider their applications. This point too fell away at the hearing before the judge. This left, in effect, point (1) as the sole remaining point: namely, as to whether the Hong Kong government had taken all reasonable steps vis-à-vis the Vietnamese government to effect early repatriation of all Vietnamese migrants who had been "screened out" as refugees. As to this the evidence - set in an international context and involving agencies outside of Hong Kong - will be looked at later on in this judgment.

Section 13D Immigration Ordinance

At the heart of this appeal are the provisions of s13D(1) of the Immigration Ordinance which states:

> "**13D Detention pending decision as to permission to remain in Hong Kong, or pending removal from Hong Kong.**
>
> (1) As from 2 July 1982 any resident or former resident of Vietnam who -
> (a) arrives in Hong Kong not holding a travel document which bears an unexpired visa issued by or on behalf of the Director; and
> (b) has not been granted an exemption under section 61(2),
>
> may, whether or not he has requested permission to remain in Hong Kong, be detained under the authority of the Director in such detention centre as immigration officer may specify pending a decision to grant or refuse him permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong, and any child of such a person, whether or not he was born in Hong Kong and whether or not he has requested permission to remain in Hong Kong, may also be so detained, unless that child holds a travel document with such a visa or has been granted an exemption under section 61(2)."

Background facts

Each of the parties in CA 51/97 and CA 71/97 arrived in Hong Kong as part of the "second wave" of migrants from Vietnam. The story of this mass influx has been told in many reported decisions and need not be repeated here. As Keith J said in re *Chung Tu Quan* [1995] 1 HKC 566 at 57I-572A:

> ".... the message since 1988 to those living in Vietnam who were minded to flee to Hong Kong was that if they did so, they would be detained pending the determination of their claim for refugee status, and if that claim was rejected, they would be detained pending their repatriation to Vietnam."

The legal basis for carrying out this policy was (and is) s13D of the Immigration Ordinance.

Crucial to a proper understanding of the statutory scheme is the Comprehensive Plan of Action adopted at the International Conference on Indo-Chinese Refugees held in Geneva in June 1989. Part F of the Comprehensive Plan of Action provides:

> "F. <u>Repatriation/Plan of Repatriation</u>
>
> 12. Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the

responsibilities of States towards their own citizens. In the first instance, every effort will be made to encourage the voluntary return of such persons.

13. In order to allow this process to develop momentum, the following measures will be implemented:
    (a) widely published assurances by the country of origin that returnees will be allowed to return in conditions of safety and dignity and will not be subject to persecution.

    (b) The procedure for readmission will be such that the applicants would be readmitted within the shortest possible time.

    (c) Returns will be administered in accordance with the above principles by UNHCR ... an internationally funded reintegration assistance will be channelled through UNHCR ....

14. If, after the passage of reasonable time, it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective, alternatives recognised as being acceptable under international practices would be examined ....

15. Persons determined not to be refugees shall be provided humane care and assistance by UNHCR and international agencies pending their return to the country of origin. Such assistance would include educational and orientation programs designed to encourage return and reduce reintegration problems."

Vietnam was, of course, a party to this international agreement, and was obliged to re-admit their former residents who had fled to Hong Kong without travel documents.

Voluntary repatriation

The evidence is clear beyond dispute that the Hong Kong government's policy has always been to have the Vietnamese migrants, once "screened out", returned to Vietnam as soon as possible. But, as the name itself indicates, the voluntary repatriation program is *voluntary:* it requires the migrants to volunteer. All that the Hong Kong government can do is to encourage the migrants to volunteer. To this end, counselling programmes have been introduced in the detention centres, and special arrangements have been made so that once a migrant has applied to the UNHCR representative

for repatriation, the migrant is transferred to the Whitehead Voluntary Repatriation Centre. This facilitates their being interviewed by the Vietnamese delegation who have offices inside the centre, and affords the volunteers a measure of protection from intimidation by other non-volunteers. Within Whitehead Voluntary Repatriation Centres A and B there are clinics and offices for UNHCR field staff. There are also social service programs run by different agencies, including a vocational training program operated by a voluntary organisation known as Christian Action.

The evidence before the court shows the gathering pace of the voluntary repatriation program. From 874 returned to Vietnam in 1989, the numbers had risen to 12,333 in 1992. But that still left large numbers of migrants in detention, pending removal, at the end of 1992.

The Orderly Repatriation Program (ORP)

As will be recalled, the Comprehensive Plan of Action envisaged that every effort would be made to encourage the voluntary return of migrants, but if insufficient progress is made, other measures would have to be considered.

As at the end of 1991, the total number of Vietnamese migrants in Hong Kong (including refugees awaiting resettlement overseas) was over 60,000. To underpin the voluntary repatriation program and in order to speed up the rate of returns the Hong Kong government agreed with the Vietnamese government on 29 October 1991 to introduce a compulsory program. Unlike the voluntary repatriation program, which involved the intervention of the UNHCR, ORP was to be implemented by direct dealing between the two governments. However, the Vietnamese government's capacity to process and absorb returnees was limited, and whilst Hong Kong had the largest number of Vietnamese migrants within the region, there were returnees from other countries such as Thailand, Malaysia and Indonesia to be absorbed as well.

As far as Hong Kong was concerned, the way the Vietnamese government limited the numbers of those to be returned under the ORP was by the number of flights they permitted to land with returnees.

The ORP, established at the end of October 1991, had a slow start. In 1992, no more than 211 migrants were returned under this program, with the number increasing to 375 in 1993. In 1994, because of severe disturbances occurring within the camp, ORP was suspended for a period. The figure for 1994 was therefore only 242. In early 1995 the Vietnamese government allowed the use of a larger aircraft which permitted about 100 migrants to be moved every six weeks. Gradually, the number of flights increased so that, by about the end of last year, there were about 10 ORP flights (carrying about 100 migrants each flight) per month.

The evidence shows clearly that from about the end of 1991 onwards, the working relationship between the two governments gradually improved. Officials from the Hong Kong government would accompany the ORP flights to Hanoi, thus enabling them to gain better knowledge of conditions on the ground and to have direct dialogue with Vietnamese officials. Mr Choi Ping Tai, Head of the Vietnamese Refugee Branch, has been on ORP flights on more than 10 occasions.

In early March 1995 Mr Peter Lai, Secretary for Security, visited Vietnam for negotiations on Vietnamese migrants issues and he pressed for a more pragmatic line on the pending cases and faster clearance of the names of returnees. In the same month, a simplified procedure for the repatriation of migrants was agreed at a meeting of the Steering Committee of the International Conference on Indo-Chinese Refugees. The aim was for the Comprehensive Plan of Action to be fully implemented by the end of 1995: though it was recognised that in the special case of Hong Kong, having regard to the large numbers involved, this was unlikely to be achieved. The principle

feature of the new procedure was that it applied to all migrants, whether they had volunteered for repatriation or not.

Up to this point in time, the policy of the Hong Kong government was to submit the names and particulars of migrants to be returned under the ORP by stages, in order that the Vietnamese authorities should not be swamped, thus producing delays. However, once the simplified procedure was agreed in March 1995, the Hong Kong government acted with speed. By the end of July 1995 the particulars of *all* detainees had been submitted by the Immigration Department to the Vietnamese authorities. In this regard, the judge found as follows (p6-J judgment):

> "This was well ahead of the target which the Immigration Department had been working to at the end of 1994. At that time, it had aimed to submit the particulars of all detainees by the end of 1995, which would have been well ahead of the prevailing capacity of the Vietnamese authorities to process them."

The judge summarised the position as it stood at the time of the hearing before him, in January 1997, as follows:

> " The simplified procedure has been matched by an increased willingness on the part of the Vietnamese authorities to increase the rate of repatriation to Vietnam. A number of technical meetings have taken place between officials of the Hong Kong and Vietnamese Governments to discuss the implementation of the repatriation programme, and to resolve such difficulties as arise from time to time. As a result, the number of detainees returned to Vietnam has increased significantly in the last year. Almost 15,000 detainees were repatriated to Vietnam in 1996, almost 6,000 of them being returned in the last three months of 1996. By the time the hearing before me commenced, there were only about 5,800 detainees still in Hong Kong. Of these, about 2,800 had been cleared for return. They were therefore waiting to be included on one of the flights for returnees, or cannot be returned yet because, for example, they are pregnant or ill, or involved in litigation, or awaiting clearance for members of their family. Only about 3,000 detainees have not yet been cleared for return by the Vietnamese authorities.
>
> The current pace of the repatriation programme has been reflected in the fate of the Applicants. Of the 1,376 Applicants, 461 had been repatriated to Vietnam by 23rd January, and a further 255 had been cleared by the Vietnamese authorities to return but were awaiting repatriation. Only 659 of the Applicants had still not been cleared for repatriation."

Hardial Singh principle(iii): all reasonable steps

It is common ground between the parties that implicit within the statutory scheme for the detention of Vietnamese migrants pending removal is the proposition that the Director must take all reasonable steps within her power to ensure that the detainees' removal is achieved within a reasonable time. This is the third of the "Hardial Singh principles" referred to in *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111-C.

It will be recalled that it was only in November 1991 that the ORP, by agreement with the Vietnamese government, was put in place. The judge found as a fact that the steps taken by the government to implement the program and effect the forcible repatriation of migrants who had not volunteered were reasonable. As regards such steps as might have been taken *before* the ORP was in place, the judge referred to the evidence to the effect that, in December 1989, the government unilaterally returned to Vietnam a group of 51 migrants who had not volunteered. A similar group of 23 migrants was returned under the auspices of the UNHCR in December 1990. Both these actions attracted international criticism. The judge held that, in those circumstances, no valid complaint of the government could be made in its decision to wait until such time as a bilateral agreement with Vietnam for the return of non-volunteers was in place.

The judge concluded his findings as follows:

> "In conclusion, therefore, without looking at individual cases, I am satisfied that the Director has taken all reasonable steps within her power to ensure that the detainees' removal from Hong Kong is achieved within a reasonable time."

Hardial Singh principle (ii): length of detention

Again, it is common ground between the parties that the statutory scheme for the detention of Vietnamese migrants pending their removal

contains this implication: If it becomes evidentially clear to the court that removal is not going to be possible within a reasonable time, further detention is not authorised.

As to this, s13D(1A) gives guidance to the court in determining the reasonableness of the period of detention. Where relevant, the section says:

> "(1A) The detention of a person under this section shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances affecting that person's detention, including -
>
> (a) ....
>
> (b) in the case of a person being detained pending his removal from Hong Kong -
>
> (i) the extent to which it is possible to make arrangements to effect his removal; and
>
> (ii) whether or not the person has declined arrangements made or proposed for his removal."

As to this, the judge noted that the periods of detention of the applicants before him ranged from 74 to 103 months. Then the judge added:

> "But five of them have never applied for voluntary repatriation, and another four only applied for voluntary repatriation in 1996. One of them only applied in 1995, and although [A336] applied for voluntary repatriation at least three times (the first time being in 1992), he either withdrew his application subsequently or is said to have refused to be transferred to the detention centre reserved for those who had volunteered for repatriation."

The judge accordingly concluded generally that the detention of none of the test applicants before him had been for an unreasonable time. It is note-worthy that whilst para 7 of the Case (as quoted earlier) avers that the applicants' detention was "in no way 'self-induced' within the meaning of the Privy Council's decision in *Tan Te Lam*" and that "individual applicants from within each category have applied for voluntary return", the fact is that, on the judge's findings in relation to the 12 test applicants, the detention of *all* of them was, to a larger or lesser extent, "self-induced".

Hardial Singh principle (i): purpose

As stated by Woolf J in *Hardial Singh* [1984] 1 WLR 704 at 706 - quoted in *Tan Te Lam* at 108E:

> "First of all, it can only authorise detention if the individual is being detained ... pending his removal. It cannot be used for any other purpose."

Miss Gladys Li's argument, in effect, is that the power of detention has not been used predominantly to facilitate removal but to make examples of the applicants so as to deter those still in Vietnam from attempting to flee. It is therefore argued that the power of detention has been misused. This submission goes against the tenor of the evidence, and was rejected by the judge.

The real question is: Given the enormous task facing the Director, what alternative did she have to the policy of detention pending removal, if the migrants did not volunteer to return? It is clear from the evidence before us that the forcible repatriation of migrants is not easy to effect. Obviously, in a straight-forward case, where the migrant has given clear and accurate information concerning himself - home address, family relationships etc - there may be little difficulty in the migrant being "cleared" for return, once the particulars have been forwarded to the Vietnamese authorities, and no impediment such as the "nationality issue" gets in the way. But, often, the particulars are unclear, or are contradicted by information given subsequently; or perhaps, circumstances have simply changed in the meanwhile. Accordingly, the migrant may need to be interviewed a number of times: the Vietnamese delegation resident in Hong Kong is often engaged on this task. Instances of misleading information - perhaps deliberately so, in order to frustrate the efforts at repatriation - are not unknown. To introduce a policy of conditionally freeing the migrants during the investigation process and to permit the migrants to integrate themselves into the fabric of normal Hong

Kong society pending their forcible removal would obviously have a very damaging effect upon the whole program. The process of repatriation would inevitably slow right down, and there will undoubtedly be migrants who would breach the conditions of their recognisances and attempt to frustrate repatriation. Miss Li's submission therefore contains this internal contradiction: There has been inordinate delay in repatriating the applicants to Vietnam: But the Director should have adopted a policy of conditionally freeing some (or all) of them, with the inevitable result of even greater delay.

The judge, in dealing with this point, adverted (p14-P to 15-D, judgment) to the policy of the government: That it was socially unacceptable and undesirable that persons found not to be refugees should be released to live and work in the community.

The legislature is, in our judgment - subject to the proper application of the *Hardial Singh* principles as relevant to Hong Kong - entitled to pursue this policy and it is not the function of the courts by over-subtle interpretations of the law to frustrate it.

It is worth mentioning that in examining the first of the *Hardial Singh* principles, the judge seems to have articulated the proposition differently from the way Woolf J puts it in *Hardial Singh*. The way Keith J puts it is this:

> "If there is no reasonable prospect of their removal from Hong Kong in the foreseeable future, the time which is reasonably necessary to effect their removal has expired and they are entitled to be released."

In this regard, the judge identified four categories of detainees: though, in reality, there were only two which needed examination: It is common ground that in relation to migrants whose cases have been expressly *rejected* by the Vietnamese government for repatriation, detention "pending removal" under s13D can no longer be justified; likewise, where migrants

have been "cleared" for return, counsel for the applicants accepts that they can be lawfully detained: And, indeed, in relation to those who have previously been released by order of the court, they have in fact been re-detained pending arrangements for their travel to Vietnam.

The two remaining categories the judge looked at closely were:

(a) those cleared for return some time ago but in relation to whom there was delay in their repatriation; and

(b) those who have not yet been cleared for return, although their names have been submitted some time ago.

As far as category (a) is concerned, the rate of return depends upon the number of flights and the size of aircraft permitted by the Vietnamese government. Because of the accelerating rate of return under the ORP, the judge concluded that there was a prospect of their removal in the foreseeable future. That left, in effect, those in category (b) which concerned a particular group of migrants not regarded by the Vietnamese authorities as Vietnamese nationals: the "nationality issue". As to them, the judge noted that, regardless of the Vietnamese government's policy, large numbers of migrants in that category have *in fact* been repatriated. The judge further noted that of the 234 applicants comprised in the original application for habeas corpus who had made that assertion, 127 had already been repatriated by the time the judge came to hear the applications of the 12 test applicants. He also noted the irony of the situation in that the migrant who was the 1st appellant in *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* - Mr Tan Te Lam himself - has, since his successful appeal in the Privy Council, been re-detained and repatriated.

The judge therefore concluded that, even in relation to the more problematic cases where repatriation seemed on the face of things to go against Vietnamese government policy, nevertheless there was a prospect of

removal in the foreseeable future. The judge therefore concluded that *Hardial Singh* principle (i), as he saw it, was satisfied as well.

As regards the matters averred in paras 89 and 90 of the Case, the judge dealt carefully with the complaints at length (p37 to 42, judgment) and dismissed them. Nothing said by counsel in this court begins to show that the judge had erred in his analysis. As mentioned earlier, the judge concluded that, generally-speaking, the Director had taken all reasonable steps within her power to ensure that the detainees' removal was achieved within a reasonable time.

In short, the judge concluded that the *Hardial Singh* criteria had, generally-speaking, been satisfied. How, then, did he come to grant writs of habeas corpus in relation to four of the applicants before him? To understand this, it is necessary to revert to the history of the proceedings.

Affidavit evidence

Before the judge, in relation to the 12 test cases alone, there were nearly 600 pages of evidence filed. It will be recalled that in the applicants' Case, it was said that the 1376 applicants were divided into three categories. The first category comprised ethnic Chinese who were regarded as aliens in Vietnam or whose immediate family members were so registered. By the time the matter was argued before the judge in January 1997 it was clear that this issue, which loomed so large in *Tan Te Lam* (the "nationality issue") - and formed the basis of the judge's order for release in that case - could not be sustained. The reality - not so apparent at the time when Keith J determined the issue in *Tan Te Lam* - is that former residents of Vietnam, who had previously been holders of foreign residents' permits, were and are in fact being accepted for repatriation by the Vietnamese government. This is, perhaps, not surprising, considering that government's obligation under the Comprehensive Plan of Action.

In truth, by the time the judge heard the applications in January 1997, the main ground for application had disappeared. What was left were the general complaints of delay, and of failure to "take all reasonable steps" to effect repatriation.

This, however, did not deter counsel for the applicants from pursuing another line of attack: an approach not adumbrated in the Case. It is what came to be called the "address issue".

The "address issue"

In the course of the hearing before the judge, a large number of documents relating to the 12 test applicants were exhibited, many of them containing information supplied by the applicants themselves. Tracing the steps taken in relation to one of the test applicants Nguyen Van Thanh (A336) as an example - he is one of the two remaining respondents in CA 51/97 - the following facts emerge:

(i) A336 had changed his mind about voluntary return several times. In November 1995 he applied again but appears to have refused to be transferred to the Whitehead Voluntary Repatriation Centre. A336 says he did not refuse - a claim the judge viewed with scepticism.

(ii) Two years before, in November 1993, A336's particulars had been submitted to the Vietnamese authorities to be processed in a batch containing the particulars of 530 detainees. This was under ORP.

(iii) In May 1994 further information was required by the Vietnamese authorities, and that was supplied in June 1994.

(iv) That information was submitted again in February 1995 in a batch which included the particulars of 121 detainees.

(v) In December 1995, the information was submitted yet again in a batch which included the particulars of 280 detainees: said to have been for "priority clearance".

(vi) In November 1996 his particulars were included in a batch divided up geographically, in accordance with a new procedure agreed with the Vietnamese authorities, to facilitate the location of the migrant's place of origin.

(vii) In December 1996 he was interviewed by a visiting Vietnamese delegation.

A336 had not been cleared for repatriation when the judge dealt with him the following month.

As regards the procedures for submitting the particulars to the Vietnamese authorities, the judge had, earlier in his judgment, examined those at length and had satisfied himself that the Director could not be criticised in that regard.

And yet, when the judge came to look at the material in A336's case microscopically, he concluded that the Director had not, after all, taken all reasonable steps to ensure that A336 would be removed from Hong Kong within a reasonable time. That was because of the "confusion" which had arisen over A336's address. The confusion allegedly arose in this way:

(i) When A336 first arrived in Hong Kong in May 1989 he had given an address as his family's address in Hai Hung Province.

(ii) In his affirmations he claims that apart from the Hai Hung Province address, he had also later on given an address in Quang Ninh Province where his foster parents had once lived and had also given to the Immigration Department an address in Ho Chi Minh City where his foster father lived.

(iii) And yet, in the form submitted in November 1996, the only address for A336 given to the Vietnamese authorities - in two different slots - was the original family's address in Hai Hung Province.

"Slap-dash" way in which particulars were sent

The judge concluded on the material before him - without oral evidence or cross-examination - that the way in which A336's particulars had been submitted was "slap-dash".

The Director had had no opportunity to deal with that criticism; she did not know that was the case she had to meet. Nevertheless the judge held that the Director had not satisfied him (i) there was a reasonable prospect of A336's return in the foreseeable future and (ii) that all reasonable steps had been taken for his return.

The foundation for the judge's findings was: (a) The Immigration Department had erred in sending to the Vietnamese authorities the Quang Ninh Province address where A336's foster parents *had once lived*: It was, the judge said, pointless and served only to confuse the issue (p70-N, judgment); (b) The fact that two identical addresses (the original family home's address in Hai Hung Province) were put twice in the form submitted in November 1996 was "an indication of the slap-dash way in which his particulars had been submitted".

We cannot accept these findings. As to (a), the evidence is far too slender for a court to conclude that the submission of the Quang Ninh Province address to the Vietnamese authorities was pointless: it might or might not have been so; there had not been sufficient investigation of the point for the judge to so conclude. But assuming it was futile, it was, putting the point at its highest, an error made in good faith, in an attempt to effect repatriation. In the most perfect of administrations, clerical mistakes will occur. When *Hardial Singh* principle (iii) speaks of "all reasonable steps" the court was not envisaging flawless implementation. That is beyond the human condition - particularly where the administration is trying to cope with a mass movement of people. In *Hardial Singh* itself Woolf J was dealing with only

one single individual. The *Hardial Singh* principles are not carved in tablets of stone. They have to be applied with discrimination flexibility and common-sense.

As to (b), regarding the form submitted in November 1996: This was a "bio data" form, agreed with the Vietnamese government. It had two slots: "Address reported on arrival" and "New information furnished". In both, the Hai Hung Province address was given. We fail to understand the basis of the judge's criticism. It would appear, on the material before the court, that A336's family home - where two brothers and three sisters also lived (if the information given at his interview in December 1989 were true) - was indeed in Hai Hung Province. If, under "New information furnished" the officer repeated the address, why should he be criticized?

Erroneous approach

Furthermore, the entire approach was misconceived. As Mr Marshall QC rightly submits, when dealing with the repatriation of tens of thousands of migrants to Vietnam, the only possible approach (without the deployment of vast resources) is a "graded approach": which, as experience indicates, in fact works and has resulted in large numbers of migrants being returned under the ORP. As the judge found, repatriation of detainees in the last three months of 1996 was progressing at the rate of 2,000 per month, many of them under ORP. The fact that there was delay in A336's case is no indication of deficiency in the system. And, of course, the matter was largely in A336's own hands: If he had not changed his mind and had stuck to his choice of voluntary repatriation, he would in all probabilities have regained his liberty - and got the financial assistance under the voluntary scheme - long ago.

Microscopic examination of material

The kind of microscopic examination which the judge conducted in relation to the case of A336 was simply not one which the department, with its resources, could have undertaken. Had it been undertaken, it might or might not have resulted in A336's clearance more quickly. But one thing is sure: the use of resources for individual cases in this way necessarily means the diversion of resources from elsewhere, resulting in the slowing down of the whole process. The supervisory jurisdiction of the High Court under Order 54 cannot - and was never intended - to be used in this way.

Moreover, in meeting the applicants' case by affidavit evidence, the Director was meeting the issues as formulated in the original Case: The question of wrong address, incomplete address etc was never an issue. The judge was not entitled to determine the legality of the detention as if the issue were properly raised and joined.

Section 13D (1AA)

Further, the judge should have given some weight to the legislative amendment in s13D(1AA) - made after the judgment of the Privy Council in *Tan Te Lam* which reads:-

> "(1AA) Subject to subsections (1AB) and (1AC), where -
>
> (a) a person is being detained pending his removal from Hong Kong; and
>
> (b) a request has been made to the Government of Vietnam by-
>
> (i) the Government of Hong Kong; or
>
> (ii) the United Nations High Commissioner for Refugees acting through his representative in Hong Kong,
>
> for approval to remove the person to Vietnam, for the purposes of detention under subsection (1), 'pending removal' includes awaiting a response to the request from the Government of Vietnam."

On any view of the facts, the department was, in January 1997, when the judge considered A336's case, *awaiting a response* to the request for his

removal from the government of Vietnam. Nothing in the evidence contradicted the *prima facie* presumption of legality arising from this subsection.

Obviously, subsection (1AA) is not conclusive on the issue and weight must also be given to subsection (1AC) which says:

> "For the ... avoidance [of doubt], nothing in subsection (1AA) shall prevent a court, in applying subsection (1A), from determining that a person has been detained for an unreasonable period."

But, in A336's case, he had been interviewed by the Vietnamese delegation only about a month before the judge dealt with his case in January 1997. Clearly, a response was being awaited. It would be an extraordinary thing if, in these circumstances, subsection (1AC) could tip the scales the other way.

Chieng A Lac (A1)

In relation to Chieng A Lac (A1) the judge said this:-

> " I have not found A1's case easy, but the fact remains that, for one reason or another, the interviewing teams regard the fact that he has nowhere to return to as a real problem. I cannot gauge how serious that problem is. Not without hesitation, I have concluded that it has not been established that there is a reasonable prospect of his return to Vietnam in the foreseeable future. I therefore declare that his continued detention under section 13D(1) is unlawful. I order his immediate release."

It is crystal clear from the evidence that A1's case is still being processed by the Vietnamese government. He only volunteered for repatriation in June 1996 and was interviewed by the Vietnamese team in December 1996. When the judge heard the case in January 1997 the department was awaiting a response; two months had not yet passed. It is impossible in these circumstances to conclude that there was no reasonable prospect of A1 being repatriated in the near future. All reasonable steps had

been taken to effect his return. The only possible conclusion for the judge to reach was that A1's detention was lawful.

Bill of Rights

In the court below, the applicants relied upon three provisions of the Hong Kong Bill of Rights as follows:

> Article 3: "No one shall be subjected to ... cruel, inhuman, or degrading treatment."

> Article 5(1) which states:
>
> "Everyone has the right to liberty ... of person. No one shall be subjected to arbitrary ... detention."

> Article 6(1) which states:
>
> "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

At the outset, the judge had to answer a threshold question, namely, whether the Bill of Rights applied at all to the detention of the Vietnamese migrants, having regard to s11 of the Hong Kong Bill of Rights Ordinance, Cap 383, which provides:

> "As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

The argument for the migrants runs thus. Section 11 refers to immigration legislation governing, inter alia, "stay in" Hong Kong; the word "stay" has a technical meaning in the context of immigration legislation; it applies to persons who have been permitted to enter Hong Kong and *immigration legislation governing stay in Hong Kong* means legislation governing *conditions of stay*; since the Vietnamese migrants now in detention

are those to whom permission to remain has been refused, it follows that legislation conferring the power of detention on the Director is not *legislation governing stay in Hong Kong* in terms of s11.

If this argument be right, this curious result ensues: whilst those persons who seek to enter and stay in Hong Kong *lawfully* would be excluded from any protection of their rights by virtue of s11, persons who have been refused permission to remain in Hong Kong and are therefore *illegal immigrants* would enjoy protection under the Bill of Rights. No court would give the statute such a construction unless the words used are compelling.

Counsel for the Director argues that the words "entry into, stay in and departure from Hong Kong" in s11 should be given their ordinary meaning. "Stay in Hong Kong" means what it says, and includes stay in a detention centre on order of the Director made under s13D(1) of the Immigration Ordinance. Since the Vietnamese migrants are undoubtedly "persons not having the right to enter and remain in Hong Kong" in terms of s11, it follows that the Bill of Rights does not affect the power of detention under s13D(1).

We agree with this submission and see no reason why s11, and in particular the expression "stay in Hong Kong", should be given an artificial interpretation. We therefore must differ from the judge in this regard. We note that the judge was not referred to the decision of this court in *Ho Hai-tak v. Attorney General* [1994] 2 HKLR 202 where, though on rather different facts, the court appears to have taken a broad view of s11 as well.

This construction of s11 does not affect, in the end, the result of the case because the judge went on to hold that, upon the facts, none of the rights guaranteed under Articles 3, 5(1) and 6(1) were infringed.

The order for discovery

After the judge had given judgment in relation to the 12 test cases on 5 February 1997, he had to go on to consider the applications of the remaining migrants which had been adjourned on 19 November 1996. It is important to note how the position stood in relation to the *remaining applicants* on 5 February 1997 when the judge made the order for discovery which is now under appeal by the Director in CA 42/97:

(1) There was the Case for the applicants setting out, in detail, the nature of their complaints (divided into 3 categories) supported by a general affirmation of a solicitor's clerk and the supporting affirmations of the individual applicants.

(2) On the Director's side, there was before the court an affirmation of Mr Choi Ping Tai, Head of the Vietnamese Refugees Branch setting out in detail the steps taken by the Immigration Department in relation to the repatriation of the migrants under the two schemes: the voluntary repatriation scheme and the ORP.

There was nothing more.

Pausing there, the position should have been straight-forward: Each party was free to conduct its case as it chose. If, upon the state of the evidence as it stood, the initial burden of proof had been discharged by the remaining applicants, and there was on balance a case of unlawful detention, the applicants were entitled to succeed. If, however, on the material put forward by the Director, the jurisdictional facts justifying detention had been established, the applications failed.

The Director did not file evidence dealing with each of the remaining cases regarding their individual circumstances because the Case as lodged by the 1,376 applicants never called for such evidence.

It is important to bear in mind this fact: the application for writs of habeas corpus on behalf of the 1376 applications (comprising approximately 4,000 individuals) did not call for individual treatment beyond the three broad categories as set out in the Case. There was no suggestion that, by a close examination of the files relating to each of the applicants, "illegality" on wholly different and unexpressed grounds might be disclosed: such as, for example, that the wrong names or the wrong particulars had been sent to the authorities in Vietnam.

What happened was that, on the case as originally put forward, the applicants must, on the judge's findings, inevitably fail. But, without amending the original application they tried to change tack. They asked for *all* the papers relating to *all* the remaining applicants and by a microscopic examination of those papers they hoped that some procedural defect or blunder on the part of the authorities might be discovered. Such an approach (categorised correctly as a "fishing expedition" by Mr Marshall) is impermissible.

When the matter was put to Mr Dykes QC at the hearing of the appeal, his explanation was this: The applicants were not in a position to know what had been recorded in the documents in the Director's possession; in particular, what information concerning the applicants had been forwarded to the Vietnamese authorities; if those representing the applicants could examine the files and papers, they would be able to eliminate, perhaps, some of the unmeritorious cases, leaving those with genuine complaints to pursue their remedies.

Discipline of law

With respect to Mr Dykes, this is a misuse of the process of discovery. It ignores the provisions of Order 24 r13(1) which states:

> "(1) No order for the production of any documents for inspection or to the Court or for the supply of a copy of any document shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."

The judge's order of 5 February achieved none of the purposes of Order 24 r13(1). Quite the reverse. The "matter in question in the cause", as identified in the applicants' Case did not justify the making of the order.

It was this departure from the discipline of law which led the judge into error. In his ruling of 17 March 1997 the judge said this:

> " After I delivered judgment on 5th February in the case of the 12 test Applicants, I gave some directions in relation to the cases of the remaining Applicants who were still in Hong Kong. Those directions required the Director of Immigration to provide the Applicants' solicitors with copies of various documents relating to the remaining Applicants. The categories of documents which I ordered should be provided were not controversial: the Director of Immigration had produced in the course of the proceedings documents in these categories relating to the 12 test Applicants. All I was doing was ordering that copies of documents in the same categories relating to the Applicants whose individual cases had not yet been considered be provided.
>
> One of the advantages of such an order was that it would relieve the Director of Immigration of an enormous amount of work which she would otherwise have had to do. The next stage in the proceedings would ordinarily have been for the Director of Immigration to file evidence relating to the individual cases of all the remaining Applicants. That would have been a daunting task. It would have involved (a) retrieving from the files the relevant documents for each Applicant, (b) scrutinising them for the purpose of identifying the steps which had been taken to effect their removal from Hong Kong, (c) filing affirmations similar to the affirmations filed in relation to the 12 test Applicants, and (d) exhibiting to those affirmations the relevant documents. The effect of my order was to relieve the Director of Immigration for the time being of much of this work. All she had to do in the short term was to provide copies of the relevant documents to the Applicants' solicitors. The ball would then be in their court. They would then have to identify which of the Applicants they contended were still being unlawfully detained. Once <u>those</u> Applicants had been identified, I could make further directions for the hearing of <u>their</u> cases."

In the passage above, the judge appears to have forgotten the original purpose of hearing the 12 test applications: this was based upon the

written application lodged by the 1,376 applicants: they having "always accepted that it would not be possible to consider individually to their 3 cases ...." (p26 K-M, judgment).

Possibly, in relation to the 12 "test" applicants, the Director had exhibited more documents than were warranted by the issues set out in the Case. But that is not the point. The point is simply that there was no justification for making the cases of the rest of the applicants (then over 900) "test cases".

CA 62/97

When the judge made his order of 17 March 1997 for the filing of affirmations at the rate of 50 applicants per week, there were then 653 applicants. In other words, more than half of the original applicants had either been cleared or had actually been repatriated. That was in the course of about 4 months. The judge's time-table, if adhered to, would have meant that the last batch of affirmations would have been lodged in the first week of July 1997: Assuming the original rate of return was maintained, the number of applicants by the first week of July would have halved again. In other words, much of the evidence filed in accordance with the judge's order would have been irrelevant.

In fact, as we were told when the appeal opened before us on 14 May, the rate of return has greatly accelerated and there were less than 100 migrants left, out of the original 1,376 as parties before us. And at this rate, the judge's order of 17 March for the filing of evidence would have been *wholly* in vain by the first week of July.

Conclusion

It is right that the High Court, in the exercise of its supervisory jurisdiction, should be vigilant in the protection of individual liberty and that

statutory provisions purporting to authorize administrative detention must be construed with a presumption in favour of individual liberty. These principles have never been in doubt. On the other hand, the courts have to be sensitive to the requirements of good administration, which ensure that the rights of *all* individuals - as opposed simply to those with the good fortune of having access to lawyers and are able to institute legal proceedings - are respected.

The reality is that the only policy which the Hong Kong government has established for looking after Vietnamese migrants arriving after 2 July 1982 is administrative detention. The reasons for this have been explained elsewhere and need not be repeated. Normally a change of policy - such as the conditional release of detainees pending compulsory return to Vietnam - is preceded by extensive public consultations and debate in the legislature. And before a new policy is introduced, administrative arrangements must be put in place. The purpose and effect of the present applications made on behalf of so many people, were they to succeed, would have been to force the government to change its policy by judicial intervention, without regard to the wider interests of good administration. And if the wheels of justice had been able to spin at the push of a button, it would have meant - on the applicants' case - that something like 4,000 people (young, old, able-bodied and infirm) - would have been released at the stroke of the judge's pen.

The judge examined the complaints of systemic unfairness with meticulous care and rejected all the allegations made. He was satisfied that, generally-speaking, the *Hardial Singh* criteria had been satisfied. That should have been the end of the matter. His error was to have embarked upon a roving inquiry at counsel's invitation, outside the frame-work of the applicants' case, picking up evidential points along the way, and making those the basis of his judgment.

The result of the various appeals is as follows:

CA 51/97: The Director's appeal succeeds. The judge's order of 5 February 1997 is discharged.

CA 71/97: The appellants' appeal is dismissed.

CA 42/97: The Director's appeal succeeds. The judge's order for discovery made on 5 February 1997 is discharged.

CA 62/97: The Director's appeal succeeds. The judge's order of 17 March 1997 is charged.

CA 56/97: The appellants' appeal is dismissed.

(Henry Litton)	(Simon Mayo)	(Charles Ching)
Vice-President	Justice of Appeal	Justice of Appeal

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and for the Appellants in Appeals Nos. 56 and 71