Lam and Others v. Superintendent of Tai A Chau Detention Centre and Others (Hong Kong) [1996] UKPC 5 (27th March, 1996)

Privy Council Appeal No. 55 of 1995

(1) Tan Te Lam

(2) Phung Hoan

(3) Ly Hue My and

(4) Luu Tai Phong *Appellants*

v.

(1) Superintendent of Tai A Chau Detention

Centre and

(2) Superintendent of High Island Detention

Centre *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 27th March 1996

Present at the hearing:-

Lord Keith of Kinkel

Lord Browne-Wilkinson

Lord Mustill

Lord Steyn

Sir Brian Hutton

·*[Delivered by* ***Lord Browne-Wilkinson****]*

---

1. Since 1985 some 80,000 migrants from Vietnam have arrived by boat in Hong Kong ("the Vietnamese boat people"). This enormous influx has placed great strains, economic, human and legal, on the Colony. It has had to seek a balance between the claims of the immigrants to humane treatment and the practicalities of handling such a multitude of uninvited visitors. This appeal concerns four applicants, each of whom has been detained for years under statutory powers authorising such detention "pending his removal from Hong Kong". The Hong Kong Government is, of course, anxious to remove the boat people from Hong Kong as soon as possible. But, in practice, the only country to which they can be removed is Vietnam and the delay in these applicants' removal is substantially due to the attitude adopted by the Vietnamese authorities over whom the Government of Hong Kong has no direct control. In particular, these applicants allege that the Vietnamese authorities have a policy of refusing to accept repatriation of those whom they regard as being non-Vietnamese nationals, including these four applicants. In these habeas corpus proceedings the applicants allege that, given the very long periods of detention and the policy of Vietnam, their further detention is not authorised by the statutory powers and their detention is unlawful.

Background.

Before turning to the matters directly in issue, it is necessary to set out some of the background. The exceptionally comprehensive and lucid judgment of the trial judge, Keith J., sets out the facts in full from which their Lordships derive the following comparatively

short summary. The Vietnamese boat people started to arrive in Hong Kong after the fall of Saigon in 1975. The Hong Kong Government originally adopted the policy of granting to the boat people first asylum in Hong Kong. But this was only done on the basis that those granted asylum in Hong Kong would in due course be resettled elsewhere by the rest of the international community. Between 1975 and 1982 the boat people arriving in Hong Kong were not placed in detention pending their resettlement elsewhere in the world. This policy changed in 1982 when the Hong Kong Government, whilst adhering to the policy of granting the migrants first asylum in Hong Kong, took, and exercised, power to detain all those arriving from Vietnam in closed centres pending resettlement elsewhere in the world.

2. By 1988 it had become clear that that policy was not working. Between 1984 and 1987 some 8,800 migrants arrived. In 1988 there were 18,328 arrivals; in 1989, 34,114. Due to what the judge called "compassion fatigue" the rest of the world was not accepting the Vietnamese migrants for resettlement elsewhere at anything like the rate that they were being granted first asylum in Hong Kong. In consequence the policy of first asylum was abandoned. In consultation with the United Nations High Commission for Refugees ("UNHCR") a new policy was adopted which involved two stages. First, on arrival the migrant would be "screened" to see if he qualified for refugee status in Hong Kong. Second, if he did not so qualify, he would be repatriated to Vietnam. The migrant was to be held in a detention centre pending, first, the determination of whether he was entitled to refugee status in Hong Kong and, second, if not granted refugee status for a further period pending his removal to Vietnam. Alongside this change of policy by the Hong Kong Government, the UNHCR entered into an understanding with the Government of Vietnam under which a voluntary repatriation scheme to be run by UNHCR was established. The Government of Vietnam agreed to accept the

repatriation of Vietnamese citizens who volunteered to be repatriated.

3. In November 1991 the Government of Hong Kong established a scheme, the Orderly Repatriation Programme, for the compulsory repatriation to Vietnam of those migrants who had not qualified for refugee status in Hong Kong but refused to volunteer for repatriation under the UNHCR voluntary scheme.

4. The result of the implementation of these two schemes of repatriation, one voluntary, the other compulsory, was that the number of boat people detained in Hong Kong decreased from a peak of 65,000 in 1991 to approximately 23,000 in 1994. Their Lordships were told that today there are something over 20,000 migrants remaining in Hong Kong awaiting repatriation to Vietnam, the overwhelming majority of whom have, according to the Government, declined to apply for voluntary repatriation.

The repatriation schemes.

1.The voluntary scheme.

In June 1989, the International Conference on Indo-Chinese Refugees, after noting that since 1975 over 2,000,000 people had left their countries of origin in the Indo-China area, adopted a comprehensive plan of action under which, amongst other things, migrants who volunteered were to be returned to and accepted by their countries of origin under a scheme to be administered by UNHCR. The UNHCR and the Government of Vietnam signed a memorandum of understanding under which the general policy was to be implemented in relation to migrants from Vietnam. Under that scheme, a migrant wishing to volunteer for repatriation obtains from UNHCR a form which includes a box in which he is required to state his nationality. This form, when completed, is forwarded by UNHCR to the Vietnamese authorities for processing. If the Vietnamese are prepared to accept the applicant for repatriation, they issue the necessary travel documents. The understanding provided that the processing by the Vietnamese authorities should be completed, and the UNHCR informed of their decision, within three months of the application being submitted. But the judge found that this timetable had not been adhered to by the Vietnamese authorities. If the Vietnamese authorities notify UNHCR that the application is acceptable, UNHCR is required to arrange for the repatriation to take place within one month after such notification. By the end of 1995, some 45,228 migrants had been repatriated from Hong Kong to Vietnam under this voluntary scheme.

5. Two points are to be stressed. First, the application form discloses the nationality of the applicant. Second, the scheme is not run by the Hong Kong Government but by the UNHCR: the Hong Kong Government has no direct control over how it is run.

2.The compulsory scheme.

This scheme is organised by the Vietnamese Refugee Branch of the Hong Kong Government in conjunction with the Vietnamese authorities. The Vietnamese Refugees Branch periodically submits the particulars of proposed returnees to the Vietnamese authorities for them to process. The Vietnamese Refugees Branch cannot submit the particulars of too many returnees at any one time, for fear that the Vietnamese authorities (who have administrative problems) will be swamped. The submission of particulars is therefore staggered. None of the particulars submitted in 1994 had been processed by the

Vietnamese authorities by 14th December 1994. The Branch aimed to have submitted the particulars of all proposed returnees by the end of 1995, which would have been well ahead of the current capacity for the Vietnamese authorities to process. At the time of the trial before the judge, particulars of about 12,000 proposed returnees under the compulsory scheme had been submitted to the Vietnamese authorities. Of that number, about 5,500 had been processed and identified by the Vietnamese authorities.

6. The particulars of proposed returnees under the compulsory scheme are submitted to the Vietnamese authorities in a form agreed with the Government of Vietnam. There is no specific box for recording a returnee's nationality. However, the judge found that if a returnee is not a Vietnamese national that is likely to be picked up by the Vietnamese authorities in the processing exercise. That is because the form gives sufficient details to enable the Vietnamese authorities to check his particulars against his local household registration or his residential file from which they are likely to glean the fact that he is a foreign national or has a foreign resident's permit if that be the case.

7. Although the compulsory scheme has been in force since November 1991, by the end of 1994 only about 1,175 migrants had been repatriated to Vietnam under it. Their Lordships were told that in 1995 a further 864 were repatriated under the compulsory scheme.

8. Three things are to be noted about the compulsory scheme. First, the documents forwarded to the Vietnamese authorities do not specify the nationality of the migrant, but the checks made by the Vietnamese authorities are likely to disclose his nationality as recorded in the files in Vietnam. Second, the delay in compulsory repatriation is largely due to the inability of the Vietnamese

authorities to process the large numbers involved. Third, the number repatriated under the compulsory scheme is very small when compared with those repatriated under the voluntary scheme.

<u>The Legislation.</u>

Since 1981 the immigration status of the Vietnamese boat people has been regulated by a special legislative regime contained in Part IIIA of the Immigration Ordinance of Hong Kong. Although it is unnecessary in the present case to determine whether the Vietnamese boat people are technically "illegal immigrants", it is clear that at all times since the ending of the first asylum policy in 1988, a migrant arriving in Hong Kong has had no right to enter or stay there save to the extent that such right is recognised by Part IIIA of the Ordinance.

9. The power to detain Vietnamese migrants is contained in section 13D of the Ordinance, the terms of which have been amended from time to time as the policies for the time being in force have changed. It is not necessary for the purpose of this appeal to trace the development of section 13D which was finally amended to its present form in 1991. It provides as follows:-

"13D.

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

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

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

may, whether or not he has requested permission to remain in Hong Kong, be detained under the authority of the Director in such detention centre as an immigration officer may specify pending a decision to grant or refuse him permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong ...

(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)in the case of a person being detained pending a decision under section 13A(1) to grant or refuse him permission to remain in Hong Kong as refugee -

(i)the number of persons being detained pending decisions under section 13A(1) whether to grant or refuse them such permission; and

(ii)the manpower and financial resources allocated to carry out the work involved in making all such decisions;

(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."

10. It will be seen that the legislation contains two separate powers of detention: the first relates to the period during which the Vietnamese migrant is being "screened" to determine whether he is to be given refugee status in Hong Kong; the second relates to the period between the refusal of refugee status and repatriation to Vietnam. Each of the applicants in this case have been detained during both periods, but the present appeal turns on the legality of their continued detention only during the second period i.e. "pending his removal from Hong Kong".

The applicants.

A9, A10 and A11.

These three applicants, Tan Te Lam, Phung Hoan and Ly Hue My, are all of Chinese ethnic origin. A9 and A10 were born in China and subsequently went to Vietnam. A11 was born in Vietnam but claims to be Taiwanese because her father was Taiwanese. The judge found that, whatever their true nationality, all three were treated by the Vietnamese authorities as non-nationals because each, whilst resident in Vietnam, was issued with a Foreign Resident's Permit which described him or her as having Taiwanese nationality and which had to be renewed periodically.

11. All three of these applicants have been refused refugee status by Hong Kong. All three have refused to apply for repatriation under the voluntary scheme and do not wish to return to Vietnam. A9's detention started on 6th April 1991: he was detained for 25 months pending determination of his refugee status and 20 months pending removal from Hong Kong. A10's detention started on 18th August 1989: he was detained for 10 months pending determination of his refugee status and 25 months thereafter. All was first detained on 18th May 1989: she was detained for 24 months pending determination of her refugee status and 44 months thereafter.

12. Since these three applicants have not volunteered for repatriation, they can only be removed from Hong Kong by repatriation to Vietnam under the compulsory scheme. The Government of Hong Kong did not set in motion the machinery for their compulsory repatriation by submitting their particulars to the Vietnamese authorities until 8th December 1994 i.e. six days after the start of these proceedings. The Vietnam authorities did not

respond in any way to their proposed compulsory repatriation and, so their Lordships were told, that remains the position today. Were it not for these proceedings they would still be detained today.

A8.

A8, Luu Tai Phong, is also Chinese by ethnic origin but was born in Vietnam. All his family (including his wife and children) are still in Vietnam. After being refused refugee status in Hong Kong, he applied for voluntary repatriation in August 1993 but stated, incorrectly, on his application form that his nationality was Taiwanese. The reason for making this misstatement was that, whilst in Vietnam, his father had produced a forged Taiwanese document showing A8 to be a Taiwanese national in order to enable him to escape conscription in Vietnam. As a result, A8 was issued by the Vietnamese authorities with a Foreign Resident's Permit. A8 claimed that, when interviewed by a Vietnamese official in September 1993, he was told that his application for voluntary repatriation would not be accepted because he was a Taiwanese national. The judge found that the Hong Kong officials were not aware of this rejection of his application. They were informed by UNHCR (who had the sole conduct of the voluntary repatriation) that A8 had withdrawn his application. On being so informed, on 25th February 1994 the Hong Kong authorities forwarded the particulars of A8 to the Vietnamese authorities with a view to compulsory repatriation. No response had been received from the Vietnamese authorities at the date of trial and, so their Lordships were informed, until the present day.

13. A8 was in detention for 22 months pending determination of his refugee status. He is still in detention "pending removal", such latter detention having lasted, so far, for 40 months.

The proceedings.

These proceedings were started by eleven Vietnamese boat people seeking writs of habeas corpus against the Superintendents of the Detention Centres where they were being detained. Applicants 1-7 were released from detention at various stages between the commencement of proceedings on 2nd December 1994 and the delivery of judgment by Keith J. on 24th January

1995. The judge did not in his judgment deal with their applications.

14. The remaining applicants, A8 to A11, put their case before the judge in four ways. First, they submitted that their original detention (as opposed to its later continuance) was unlawful. Second, they submitted that in the absence of any order for their removal, their detention was unlawful. The judge held against the applicants on both these submissions which were not persisted in before their Lordships. The third submission ("the length of detention issue") was that, given the very long periods during which the applicants had already been detained, their further detention for an indefinite period would be unreasonable and therefore unlawful. Finally, they submitted ("the nationality issue") that the Vietnam authorities had a policy under which Vietnam would not accept the repatriation of those they treated as non-Vietnam nationals; therefore, there was no possibility of their removal from Hong Kong under the compulsory scheme; accordingly, their detention could not be "pending removal".

15. As to the length of detention issue, the judge directed himself by reference to the principles laid down by Woolf J. in *Reg. v. Governor of Durham Prison, ex parte* ***Hardial Singh*** [1984] 1 W.L.R. 704. That case was concerned with an Indian national who had been a lawful immigrant into the United Kingdom. Following the commission by him of two criminal offences, a deportation order had been made by the Secretary of State, who ordered his detention pending his removal. He had been detained for nearly five months at the time he applied for habeas corpus. Woolf J. said, at page 706C-F:-

"Although the power which is given to the Secretary of State ... to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. 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. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.

In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

16. Keith J. accepted these principles as being applicable to the present case. As to the first and third propositions stated by Woolf J., the judge held that it was for the court (not the Director) to determine whether in all the circumstances the length of detention was

reasonably necessary to achieve removal and whether the Director had taken all reasonable steps. As to the second of the propositions of Woolf J., the judge held that Woolf J. was not merely giving guidance but stating a proposition of law and that, accordingly it was for the court, not the Director, to determine whether deportation could be effected within a reasonable time. The judge further held that, in determining whether removal can be effected within a reasonable time, the court has to take into account whether the delay was caused by factors outside the control of the detainer.

17. Applying those principles to the present case, the judge held that the periods of detention pending determination of their application for refugee status were, despite their length, reasonable. In dealing with the second period of detention, i.e. the period pending their removal from Hong Kong, he said:-

"When coupled with the length of their detention pending screening, the time which these Applicants have been in detention is truly shocking. They are, at first blush, an affront of the standards of the civilized society which Hong Kong aspires to be."

18. Their Lordships agree. But the judge held that, even so, the detention was not unreasonable and therefore unlawful when viewed in context. He pointed out that A9, A10 and A11 had never applied for voluntary repatriation and that the authorities were entitled to believe that A8 had withdrawn his application. As a result, compulsory repatriation was the only possible mode of removal from Hong Kong and the speed of such compulsory repatriation was controlled, not by the Hong Kong authorities, but by the response of the Vietnamese authorities. He held that in all the circumstances the delay, though very great, had not been unreasonable.

19. The judge then considered the nationality issue. After reviewing the evidence (which their Lordships will have to consider later) he expressed himself as being "quite satisfied that Vietnam is not prepared to accept the repatriation of detainees whom it regards as non-Vietnamese nationals". He held

accordingly that Vietnam would refuse to accept A9, A10 and A11 for repatriation. He accordingly ordered their immediate release. As to A8 however he reached a different conclusion. He referred to the fact that the Governments of Hong Kong and Vietnam had recently agreed a procedure for dealing with cases where the giving of false information by Vietnamese migrants impeded the repatriation programme. He expressed himself as being "quite sure" that when the true facts relating to A8 had been made clear to the Vietnam authorities, they would accept A8 for repatriation and that there was therefore "every prospect of him being removed from Hong Kong in the near future". The judge therefore refused any relief to A8.

The Government appealed to the Court of Appeal against the judge's order to release A9, A10 and A11. A8 appealed against the judge's decision refusing him relief. The Court of Appeal (Power V.-P., Litton V.-P. and Mortimer J.A.) held that the judge's approach to the cases had been wrong in law. They held that the principles enunciated in ***Hardial Singh*** had no application in determining the legality of the detentions of Vietnamese boat people which fell to be determined solely by reference to the terms of Part IIIA of the Ordinance and in particular section 13D. They further held that, in relation to the Vietnamese refugees, the court's jurisdiction was supervisory only. It was not for the court to determine whether the duration of the detention was reasonable or whether repatriation was possible: those were matters for the Director to determine. The court could only intervene on the usual grounds for judicial review of executive decision i.e. if the decision of the Director was Wednesbury unreasonable. They held that the Director had discharged any burden of showing that the detentions were lawful by showing that the applicants were detained for the purpose of repatriation and that that purpose was not spent. There was no burden on the Director to prove to the court that it was more likely than not that Vietnam would accept these applicants for repatriation. It was enough for the Director to show that attempts were on foot to effect repatriation: this was "conclusive proof of the legality of the detention". On those grounds, the Court of Appeal allowed the appeals relating to A9, A10 and A11 and dismissed the appeal of A8. However the Court of Appeal also indicated that they doubted whether, even if the judge had been right to enter into the question whether Vietnam would in fact accept repatriation, the judge had made the correct findings of fact on the nationality issue.

All four applicants appealed to the Board against the decision of the Court of Appeal. Following that decision, steps were taken to redetain A9, A10 and A11 but, after the issue of judicial review proceedings, the Director gave an undertaking not to seek their redetention pending the decision of this appeal by their Lordships. A8 has remained in detention throughout.

The issues.

On the appeal before their Lordships Mr. Beloff, for the applicants, submitted that the Court of Appeal was in error (a) in holding that the ***Hardial Singh*** principle has no application to the present case and (b) that it was for the Director, not the court, to determine whether or not there was sufficient prospect of the applicants being repatriated to Vietnam to justify their continued detention. Mr. Beloff submitted that, on both issues, the approach of Keith J. was correct. Mr. Beloff then submitted that the judge had erred in applying that correct approach to the length of detention issue but had reached the correct conclusion on the facts in deciding the nationality issue in favour of A9, A10 and A11. As to A8, Mr. Beloff submitted that the judge's finding was wrong and had been proved to be wrong by subsequent events.

20. Mr. Pannick, for the respondents, took issue on all these points. He submitted that the Court of Appeal were right in their approach in law. Alternatively, if the judge's approach were right in law, the judge reached the right conclusion on the length of detention issue and on the nationality issue so far as A8 was concerned. As to A9, A10 and A11 the judge's conclusions of fact were erroneous.

21. Their Lordships will deal with these issues in turn.

The correct approach in law.

The **Hardial Singh** principles.

Section 13D(1) confers a power to detain a Vietnamese migrant "pending his removal from Hong Kong". Their Lordships have no doubt that in conferring such a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited. The principles enunciated by Woolf J. in ***Hardial Singh*** are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain "pending removal" their Lordships agree with the principles stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Second, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Third, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time.

22. Although these restrictions are to be implied where a statute confers simply a power to detain "pending removal" without more, it is plainly possible for the legislature by express provision in the statute to exclude such implied restrictions. Subject to any constitutional challenge (which does not arise in this case) the legislature can vary or possibly exclude the ***Hardial Singh*** principles. But in their Lordships' view the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances.

23. Their Lordships are unable to agree with the Court of Appeal that there is any conflict between the ***Hardial Singh*** principles and the provisions of section 13D. Section

13D(1A), which was inserted in 1991, expressly envisages that the exercise of the power of detention conferred by section 13D(1) will be unlawful if the period of detention is unreasonable. It expressly provides that "the detention ... shall not be unlawful by the reason of the period of detention if that period is reasonable having regard to ..." (emphasis added). What section 13D(1A) does is to provide expressly that, in deciding whether or not the period is reasonable, regard shall be had to all the circumstances including (in the case of a person detained pending his removal from Hong Kong) "the extent to which it is possible to make arrangements to effect his removal" and "whether or not the person has declined arrangements made or proposed for his removal". Therefore the sub-section is expressly based on the requirement that detention must be reasonable in all the circumstances (the ***Hardial Singh*** principles) but imposes specific requirements that in judging such reasonableness those two factors are to be taken into account.

24. The two additional factors specifically mentioned in section 13D(1A) reflect the delays in arranging with the Vietnamese authorities to accept repatriation and the fact that detainees in refusing to be repatriated under the voluntary scheme are declining to take advantage of a scheme which could effect their repatriation, and therefore their release, much more speedily. The requirement that these factors should be taken into account was directly attributable to earlier decisions in the Hong Kong courts suggesting that these factors were not relevant in determining whether the period of detention was reasonable: see *In re Pham Van Ngo and Others* [1991] 1 H.K.L.R. 499 where Sears J. indicated that, whatever the difficulties, detention for 18 months was unreasonable and *Liew Kar-seng v. His Excellency the Governor-in-Council and Another* [1989] 1 H.K.L.R. 607 at page 609.

25. For these reasons, their Lordships consider that Keith J. was entirely correct in applying the ***Hardial Singh*** principles as amplified by the provisions of section 13D(1A) to the facts of this case.

Is it for the court or the Director to determine the facts?

The Court of Appeal held that the return to each of the writs of habeas corpus, stating simply that the applicant was detained under section 13D(1) pending removal from Hong Kong, was an adequate return and the judge should have made no further enquiry into facts beyond finding "that attempts were still being made for the repatriation of the applicant". In their view, the application could only succeed if the applicant could demonstrate (and the burden was on him) that the Director was Wednesbury unreasonable in reaching his conclusion that removal from Hong Kong would at some time prove practicable. They held that the court's jurisdiction, even in a case of habeas corpus, is purely supervisory: it was not for the court to

reach findings as to the underlying facts viz. whether or not the period of detention was reasonable or whether Vietnam would accept repatriation of non-Vietnam nationals. The Court of Appeal considered that those facts were not precedent or jurisdictional facts which are for the court to decide (*Reg. v. Secretary of State for the Home Department, ex parte Khawaja* [1984] A.C. 74) but matters incidental to the exercise of the discretionary powers conferred on the Director by section 13D and accordingly for the Director to decide (*Reg. v. Secretary of State for the Home Department Bugdaycay* [1987] A.C. 514).

In *Khawaja* the House of Lords had to consider the legality of an order for the detention of the applicant as an illegal immigrant pending his removal from the United Kingdom. The order for detention was made under paragraphs 9 and 16 of Schedule II to the Immigration Act 1971 which conferred on the executive the power to order the removal of an "illegal immigrant" and his detention pending removal. The applicant had obtained leave to enter. But it was alleged that he had obtained such leave by fraud as a result of which he was an "illegal immigrant". There was a dispute of fact as to whether the leave to enter had been obtained by fraud. The House of Lords held that, since the very existence of the power to detain depended on the question whether the applicant was an illegal immigrant, the burden lay on the executive to prove to the court on the balance of probabilities that he was an illegal immigrant i.e. that he had obtained leave to enter by fraud. That was a precedent or jurisdictional fact which, in the case of deprivation of liberty, had to be proved to exist before any power to detain was exercisable at all.

In *Bugdaycay* the applicants, having obtained leave to enter by admitted fraud, then sought to claim asylum in the United Kingdom as refugees. The relevant legislation provided that, in the event of a claim for asylum, the matter was to be "referred to the Home Office for decision". It further provided that leave to enter would not be refused if removal would be contrary to provisions of the Convention and Protocol relating to the Status of Refugees. The applicants were refused leave to enter and an order made for their removal. The applicants claimed, in reliance on *Khawaja,* that the question whether or not they were entitled to asylum (because a refusal of their application would conflict with the Convention) was a question of jurisdictional or precedent fact which was for the court, not the executive, to determine. Their Lordships rejected this submission, saying that the question whether or not the applicants were refugees was but one of a large number of factual issues which had been committed by Parliament to the executive to determine in the course of exercising their discretion whether or not to give leave to enter. The facts were not, as in *Khawaja*, a condition precedent to the existence of any discretionary power, but matters for determination in the course of exercising such power.

26. The issue therefore in the present case is whether the determination of the facts relevant to the question whether the applicants were being detained "pending removal" goes to the jurisdiction of the Director to detain or to the exercise of the discretion to detain. In their Lordships' view the facts are *prima facie* jurisdictional. If removal is not pending, within the meaning of section 13D, the Director has no power at all. The case is analogous to one where a continuing discretion to detain is conferred on A if a notice has been served on B and no counternotice has been served by B. If there were a dispute as to whether a notice or counternotice had been served, it must *prima facie* be for the court to determine the question: if no notice has been served, A's power has never arisen; if a counternotice has been served, A's power has come to an end. In the absence of express words to the contrary, it is for the court to determine whether the power exists and for that purpose the court has to be satisfied as to the existence of the underlying facts.

27. Their Lordships do not exclude the possibility that, by clear words, the legislature can confer power on the executive to determine its own jurisdiction. Say, for example, the power to detain was expressly made exercisable during such period as in the opinion of the Director removal from Hong Kong was pending. In such a case the court's only power would be to review the Director's decision on Wednesbury principles. Where human liberty is at stake, very clear words would be required to produce this result. As was emphasised by all their Lordships in *Khawaja*,

in cases where the executive is given power to restrict human liberty, the courts should always "regard with extreme jealousy any claim by the executive to imprison a citizen without trial and allow it only if it is clearly justified by the statutory language relied on": *Khawaja* per Lord Bridge of Harwich at page 122E. Such an approach is equally applicable to everyone within the jurisdiction of the court, whether or not he is a citizen of the country: ibid per Lord Scarman at pages 111G-112A.

28. In the present case their Lordships can find no indication that the legislature intended the Director to have the power to determine jurisdictional fact. First, such a provision would be very surprising, given the basic constitutional importance of habeas corpus. If a jailor could justify the detention of his prisoner by saying "in my view, the facts necessary to justify the detention exist" the fundamental protection afforded by a habeas corpus would be severely limited. The court should be astute to ensure that the protection afforded to human liberty by habeas corpus should not be eroded save by the clearest words. Second, there is nothing in the language of the Ordinance to suggest that this was intended. Third, there is some indication to the contrary. Before 1991, the courts of Hong Kong had on a number of occasions reached the conclusion that the detention was not authorised by section 13D because repatriation was not pending and in so doing had reached their own conclusions of fact on the evidence adduced. In 1991 the legislature substantially amended section 13D, in particular by the introduction of sub-section (1A). Yet the legislature introduced no provision limiting the court's power to determine jurisdictional issues of fact.

29. For these reasons their Lordships are unable to agree with the Court of Appeal. Keith J. directed himself rightly in law in holding that the burden lay on the executive to prove to the court on the balance of probabilities the facts necessary to justify the conclusion that the applicants were being detained "pending removal".

The length of detention issue.

For the reasons already given, their Lordships consider that Keith J. approached this issue on the correct basis in law. The applicants contend that he reached the wrong conclusion but their Lordships find it unnecessary to reach any decision on this issue since, as will appear, the appeal succeeds on the nationality issue.

30. However, since there is a large number of Vietnamese boat people still in Hong Kong who may only be able to bring proceedings on the basis that the inordinate length of their

detention renders it unreasonable, it is desirable to emphasise one point. The large majority of those in detention do not wish to return to Vietnam and have declined to apply for voluntary repatriation. The evidence shows that, if they did so apply, most of them would be repatriated in a comparatively short time, thereby regaining their freedom. It follows that, in such cases, the Vietnamese migrant is only detained because of his own refusal to leave Hong Kong voluntarily, such refusal being based on a desire to obtain entry to Hong Kong to which he has no right. In assessing the reasonableness of the continuing detention of such migrants, section 13D(1A)(b)(ii) requires the court to have regard to "whether or not the person has declined arrangements made or proposed for his removal". In their Lordships' view the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable.

The nationality issue: A9, A10 and A11.

Keith J. expressed himself as being "quite satisfied that Vietnam is not prepared to accept the repatriation of detainees whom it regards as non-Vietnamese nationals". In reaching this conclusion, he referred specifically to three elements in the evidence. First, the evidence of A8 and three other detainees that they had been told by the Vietnamese officials who interviewed them that their applications could not be accepted because they were Taiwanese nationals. Second, evidence indicating that UNHCR officials had been told by Vietnamese officials that they would not accept non-Vietnamese nationals: since this evidence was in the

form of double hearsay, the judge attached no weight to it. Third, evidence from a witness that the Vietnamese Vice-Consul in Hong Kong had twice said that non-Vietnam nationals would not be accepted. The judge further attached weight to the fact that the Hong Kong Government had not led any evidence that, in its talks with the Vietnamese authorities, the latter had disowned any such policy or stated that there might be any exception to such policy.

31. On the other side, the Hong Kong Government produced evidence that in a random check of 50 files of ethnic Chinese detainees who had been accepted for repatriation by Vietnam, four had had Foreign Resident's Permits describing them as being of Taiwanese nationality and one of those four also had a Taiwanese passport. The judge discounted this evidence on the grounds that three out of the four cases related to applications for compulsory repatriation the forms for which do not disclose the nationality of the applicant. Moreover he pointed out that it could not be demonstrated whether the box relating to nationality on the application for voluntary repatriation had been honestly completed

or whether the applicant had followed the advice given by UNHCR that applicants should conceal non-Vietnamese nationality.

32. The Court of Appeal criticised the judge's findings of fact on grounds which were supported in argument before their Lordships. As to the first ground relied on by the judge, the Court of Appeal considered that the account given by the four detainees as to their interviews with the Vietnam officials amounted only to opinion evidence. In their Lordships' view, this is not correct. The detainees were stating as a fact that the ground stated for the rejection of their applications by the Vietnamese officials was that they were non-Vietnamese nationals. As to the statements made by the Vietnam Vice-Consul, the Court of Appeal dismissed these on the grounds that the Vice-Consul was not responsible for national policy and therefore he was only expressing an opinion. Their Lordships are again unable to accept this analysis: the Vice-Consul is a representative of the Vietnam Government in Hong Kong concerned with repatriation; *prima facie* his statement as to Vietnam policy on repatriation is likely to be correct.

33. There is more substance in the criticism of the way in which the judge dealt with the random check evidence led by the Government. The evidence in fact showed that out of the four cases relied upon, three were applicants for voluntary repatriation (who were required to disclose nationality) and one for compulsory repatriation (who was not so required) whereas the judge reversed the position. But in their Lordships' view this error by the judge is not sufficient to upset his decision on the facts: as he pointed out, the applicants for voluntary repatriation may well have suppressed their true nationality in completing their application forms as UNHCR were suggesting.

34. Finally, although more than a year has elapsed since the judge made his decision, there is still no reaction from the Vietnamese authorities to the applications for repatriation relating to A9, A10 and A11. This is retrospective support for the judge's finding. In all the circumstances their Lordships can see no sufficient reason to overturn the finding of the judge that it is the policy of the Vietnam Government not to accept repatriation of non-Vietnamese nationals. In these circumstances, it is not contended that these applicants are being detained "pending removal". Accordingly, the decision of Keith J. to order their release was correct.

The nationality issue: A8.

It will be remembered that A8 is in fact a Vietnamese national but, due to the dishonest production to the Vietnamese

authorities of papers indicating that he was Taiwanese, the Vietnamese authorities regard him as a non-national and refused him voluntary repatriation on that ground. However, the judge refused to order his release because, immediately before the hearing, the Governments of Hong Kong and Vietnam had agreed a procedure which was to apply in cases where false information given by the detainee prevents the Vietnamese authorities from determining whether to allow him to be repatriated. The judge was "quite sure" that when this new procedure was operated in relation to A8 the Vietnamese authorities would accept him for repatriation as a result of which he would be removed from Hong Kong "in the near future".

35. Their Lordships are far from saying that, on the evidence before him, the judge reached a wrong conclusion. But time has shown his forecast to be wrong. Far from A8 having been removed from Hong Kong "in the near future", nothing further has been heard from the Vietnamese authorities about his case and a year later he remains in detention. It therefore appears that the policy of not accepting those whom they regard as non-Vietnamese nationals is still being applied by the Vietnamese authorities to A8. In these circumstances, strictly A8 should be required to make a fresh application for habeas corpus. But in view of the fact that he has already been in detention for over six years, their Lordships think it right to reverse the judge's decision and order his immediate release given that no progress towards his repatriation has taken place.

36. Their Lordships will therefore humbly advise Her Majesty that all four appeals should be allowed, that the order of Keith J. in relation to A9, A10 and A11 should be restored and the order of Keith J. as to A8 should be set aside and an order made for the immediate

release of A8. The respondents must pay the appellants' costs in the courts below and before their Lordships' Board.