FACV000001/2001

FACV Nos. 1-3 of 2001

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL Nos. 1-3 OF 2001 (CIVIL)

(ON APPEAL FROM CACV NOS. 415-417 OF 2000)

FACV 1/2001

BETWEEN:

NG SIU TUNG AND OTHERS — Appellants

AND

THE DIRECTOR OF IMMIGRATION — Respondent

FACV 2/2001

LI SHUK FAN — Appellant

AND

THE DIRECTOR OF IMMIGRATION — Respondent

FACV 3/2001

SIN HOI CHU AND OTHERS — Appellants

AND

THE DIRECTOR OF IMMIGRATION — Respondent

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ

Dates of Hearing: 28, 29, 30, 31 May; 1, 19, 20, 21 June; 6 and 7 September 2001

Date of Judgment: 10 January 2002

J U D G M E N T

Chief Justice Li, **Mr Justice Chan PJ**, **Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ** :

1. In view of the length of this judgment, we have divided it into the following sections for easy reference:

INTRODUCTION

2. In these appeals, the appellants ("applicants") (some of whom are representative applicants in the proceedings) seek a determination on the claims to the right of abode in Hong Kong of various classes of persons who, though not actual parties to the decisions in **Ng Ka Ling & others v. The Director of Immigration** (1999) 2 HKCFAR 4 and **Chan Kam Nga & others v. The Director of**

Immigration (1999) 2 HKCFAR 82, claim that they are entitled to the benefit of those decisions. The applicants make this claim, notwithstanding the Interpretation issued by the Standing Committee of the National People's Congress (the "Standing Committee" or the "NPCSC") on 26 June 1999 which in effect displaced the interpretation which this Court in the two decisions had placed on arts. 22(4) and 24(2)(3) of the Basic Law. The applicants also seek orders quashing various decisions of the Director of Immigration including removal orders made by the Director of Immigration under s.19 of the Immigration Ordinance, Cap. 115. They base their case on five separate grounds. These grounds raise questions as to the interpretation and application of the Basic Law, the doctrine of legitimate expectation, abuse of process and the effect of the policy announced by the government of the Hong Kong Special Administrative Region (the "HKSAR" or the "Region") on the day when the Standing Committee Interpretation issued.

BACKGROUND

3. Article 24(2)(3) of the Basic Law confers the status of permanent resident and the right of abode on persons of Chinese nationality born outside Hong Kong of permanent residents who are Chinese citizens born in Hong Kong or having ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR. The Immigration (Amendment) (No. 2) Ordinance 1997 (the "No. 2 Ordinance") was enacted on 1 July 1997 which provided, among other things, that persons eligible under art. 24(2)(3) were limited to those who were born after at least one of their parents had become a Hong Kong permanent resident (the "time of birth limitation"). The Immigration (Amendment) (No. 3) Ordinance 1997 (the "No. 3 Ordinance") was enacted on 10 July 1997 (but purporting to take effect on 1 July 1997) to put in place a scheme for the verification of permanent resident status under this article.

4. In early July 1997, a number of Mainland born children of Hong Kong permanent residents who claimed permanent resident status under art. 24(2)(3), but did not comply with provisions of the ordinances and the scheme, instituted judicial review proceedings to challenge these provisions, after the Director of Immigration had rejected their claims and made removal orders against them. The number of persons applying for legal aid to join in those proceedings or commence similar proceedings quickly increased. The large number of applications for legal aid and the potential volume of litigation aroused serious concern and attracted public responses from senior government officials regarding the government's position in relation to those proceedings. These responses conveyed that the government would abide by the decisions of the courts. Letters were written by the Legal Aid Department to individual applicants for legal aid stating that there was no need for them to commence proceedings.

5. The main issues in those proceedings centred on the exact meaning and scope of art. 24(2)(3) and its relationship with art. 22(4). In order to reduce both the number of cases and costs, several cases were chosen as suitable vehicles for a determination by the court of the common issues. Such cases were regarded as "test cases" or "representative cases", although there was no court order directing the applicants to act as representative parties for persons who had not joined in the proceedings or commenced fresh proceedings. There is also no evidence that (except perhaps in the cases assigned by the Director of Legal Aid to the same firm of solicitors acting for the chosen cases) any agreement had been reached in some other cases to the effect that they would abide or be bound by the results in those "test cases" or "representative cases". Those cases ultimately came before the Court of Final Appeal. Pending the final determination of those cases, decisions on some of the claims for permanent resident status were withheld by the Immigration Department. Applications for legal aid were also put on hold.

6. On 29 January 1999, in the first case **Ng Ka Ling**, this Court held, among other things, that art. 24 (2)(3) was not qualified by art. 22(4) so that those persons who fell within art. 24(2)(3) and who were residing in the Mainland did not require one-way exit permits issued by the Mainland authorities to come to Hong Kong to exercise their right of abode as permanent residents. Hence, that

part of the No. 3 Ordinance which required those persons to hold one-way exit permits was held to be unconstitutional as being inconsistent with art. 24(2)(3). The retrospective provision in the No. 3 Ordinance was also held to be unconstitutional.

7. On the same day, in the second case **Chan Kam Nga**, this Court held that art. 24(2)(3) applied to Chinese nationals born outside Hong Kong of Hong Kong permanent residents, irrespective of whether they were born before or after at least one of their parents had acquired the status of permanent resident. Accordingly, that part of the No. 2 Ordinance which purported to exclude Chinese nationals who were born before at least one of their parents became a permanent resident of Hong Kong was also held unconstitutional.

8. Immediately after the decisions were handed down, the government made public statements indicating that it would accept the decisions and implement them. However, concerned by the prospect of a very large number of persons from the Mainland settling in Hong Kong, the government subsequently changed its mind and adopted a different policy.

9. On 26 June 1999, upon the request by the HKSAR government through the State Council, the NPCSC made an interpretation of arts. 22(4) and 24(2)(3), pursuant to its power under art. 158(1) of the Basic Law ("the Interpretation"). According to the Interpretation, art. 22(4) qualifies art. 24(2)(3) so that persons falling within art. 24(2)(3) must apply for approval from the Mainland authorities to enter the HKSAR. The Interpretation also stated that, for a person to qualify under art. 24(2)(3), at least one of his parents must already be a Hong Kong permanent resident at the time of his birth. In these two respects, the Interpretation in effect displaced the interpretation of this Court on the relevant provisions of the Basic Law in **Ng Ka Ling** and **Chan Kam Nga**. The Interpretation went on, however, to state that it "does not affect the right of abode in the HKSAR which has been acquired under the judgment of the Court of Final Appeal on the relevant cases dated 29 January 1999 by the parties concerned in the relevant legal proceedings". The Interpretation did not, however, affect that part of the decision in **Ng Ka Ling** which held that the retrospective provision in the No. 3 Ordinance was unconstitutional.

10. Subsequently, in December 1999, in the third case **Lau Kong Yung & others v. The Director of Immigration** (1999) 2 HKCFAR 300, this Court held that the Interpretation was a valid and binding interpretation of arts. 22(4) and 24(2)(3) which the courts of the HKSAR are under a duty to follow in future.

11. On the same day as the Interpretation was issued in June 1999, the government made a public announcement of a policy which was often (but inappropriately, as the courts below commented) referred to as "the Concession" to the effect that it "will allow persons who arrived in Hong Kong between July 1, 1997 and January 29, 1999, and had claimed the right of abode, to have their status as permanent resident verified in accordance with the (two judgments)". On the same day, other statements were made by the government about the Concession to which reference will be made later.

12. During the period leading to the **Ng Ka Ling** and **Chan Kam Nga** judgments, the applicants in the present appeals (and possibly many more) who considered that they were in the same position as the parties in those two cases did not join in the litigation or commence fresh proceedings. They now claim that they too should have their claims for permanent resident status verified according to the two judgments or, alternatively, that they are covered by the Concession.

THE PARTIES

13. The present appeals arose from three applications for judicial review. There are 5,073 (originally 5,308) applicants in HCAL 81 of 1999, 39 (originally 43) applicants in HCAL 70 of 2000 and one applicant in HCAL 2 of 2000. They are all Chinese nationals born in the Mainland and have at least

one parent who is a permanent resident of the HKSAR. They all claim to be permanent residents within art. 24(2)(3) and allege that their claims should be verified according to the judgments in **Ng Ka Ling** and **Chan Kam Nga**, that is, unaffected by the Interpretation. Most of them are in Hong Kong while some have returned to the Mainland.

14. They are divided into two groups: Group A consisting of persons who were born after a parent was already a permanent resident in Hong Kong and Group B consisting of those who were born before either parent had ordinarily resided in Hong Kong for seven years. Those within Group A would, unless they can benefit from the **Ng Ka Ling** judgment, be subject to the restriction in art. 22 (4) in that they have to obtain one-way exit permits for entry into Hong Kong. Those within Group B would, unless they can benefit from both judgments, be affected not only by the restriction in art. 22 (4) as with those within Group A, but also the "time of birth limitation" in art. 24(2)(3) and since they were born before a parent had become a permanent resident of Hong Kong, they would not qualify under that article at all. The vast majority (4639 applicants) in HCAL 81 of 1999, all of the applicants in HCAL 70 of 2000 and Ms Li in HCAL 2 of 2000 are Group B applicants.

15. The applicants came to Hong Kong at different times and in different circumstances. Most of them arrived on two-way exit permits but have overstayed. Some returned to the Mainland but came back to Hong Kong and have since overstayed. Others came illegally without any permit or without entering through normal immigration checkpoints. In some instances, as will appear, the date of an applicant's arrival in Hong Kong is important. For this reason, all the applicants are allocated to a specific time period according to their time of arrival in Hong Kong. Five periods are relevant:-

(1) Period 1 - those who arrived before 1 July 1997 and stayed until either 1 July 1997 or beyond. That is, they arrived before the Basic Law took effect.

(2) Period 2 - those who arrived between 1 July and 10 July 1997 which was the date when the No. 3 Ordinance was enacted and gazetted.

(3) Period 3 - those who arrived between 11 July 1997 and 29 January 1999, the day on which the two Court of Final Appeal judgments were handed down.

(4) Period 4 - those who arrived between 30 January and 26 June 1999, the day on which the Interpretation issued and the government announced the Concession.

(5) Period 5 - those who arrived after 26 June 1999 or have not come to Hong Kong since 1 July 1997.

16. In view of the large number of applicants, a total of 19 persons were chosen by the parties as representative applicants in HCAL 81 of 1999 and 7 in HCAL 70 of 2000. There is the single applicant in HCAL 2 of 2000. In respect of the 19 representative applicants in the first action,

(1) RA1, Ms Ng Siu Tung has been accepted as falling within the Concession and no relief is now sought;

(2) RA2, Ms Ng Kam Chi, and RA9, Ms Lin Li Pin, Penny, withdrew as representative applicants because the facts relating to their claims were so much in dispute as to render them inappropriate representatives;

(3) According to the applicants' written case, RA5, Mr Tam Siu Ming, was issued a one-way exit permit after the judgment of the Court of Appeal. He remains as a representative applicant in relation to claims under the Concession;

(4) RA7, Mr Lau Kong Yung has had his status as a permanent resident verified and has

been issued a one-way exit permit. He remains as a representative applicant for the benefit of other applicants in a similar situation;

(5) According to the applicants' written case, RA16, Ms Kwong Kin Ting, was issued a one-way exit permit after the judgment at first instance, but since she is a Group B applicant, she has not been regarded as a permanent resident; and

(6) RA18, Mr Tang Kim Ching came to Hong Kong lawfully in July 1999 and left on time. No removal order was made against him.

17. Almost all of the applicants had removal orders made against them by the Director of Immigration. Some had their applications for revocation of removal orders rejected or applications for permanent resident status refused. Some had their claims to benefit under the Concession rejected.

18. The decisions being challenged are : -

(a) in respect of RAs 3, 4, 6, 8, 10 to 15, 17 and 19 in HCAL 81 of 1999 and RAs 1 to 7 in HCAL 70 of 2000 and in respect of the applicant in HCAL 2 of 2000, the removal orders made under s. 19(1)(b)(ii) of the Immigration Ordinance;

(b) in respect of those RAs in HCAL 81 of 1999 who had removal orders made against them, the decisions not to revoke the removal orders previously made; and

(c) in respect of each RA in both HCAL 81 of 1999 and HCAL 70 of 2000 and in respect of the applicant in HCAL 2 of 2000, the decision that the applicant is not within the Concession.

19. In each of these decisions, the Director of Immigration concluded that the applicant was liable to be removed and was not entitled to remain in Hong Kong.

20. Apart from seeking to quash these decisions, all the applicants also ask for declarations that they are permanent residents under art. 24(2)(3), that they fall within the Concession (except those who arrived in Periods 4 and 5) and that they are not affected by the Interpretation and are entitled to have their status verified according to the judgments of **Ng Ka Ling** and **Chan Kam Nga**. Their applications for judicial review were refused by Stock J. at first instance. The Court of Appeal (Mayo, V-P, Leong, J.A. and Keith J.A.) confirmed that decision. With leave, the applicants appeal to this Court.

THE MAIN ISSUES IN THESE APPEALS

21. Although all the applicants claim that they are not affected by the Interpretation, there is no question of any challenge to the Interpretation. It is accepted that the Interpretation of arts. 22(4) and 24(2)(3) of the Basic Law represents the law as from 1 July 1997 and is binding on the courts. This Court so decided in **Lau Kong Yung**. It is also accepted that the Interpretation did not contain any interpretation of art. 158.

22. The main issues to be decided in these appeals are raised in the 5 grounds of appeal. In the order in which they have been presented in this Court, the grounds of appeal are:

(1) Upon the true construction of the sentence "judgments previously rendered shall not be affected" in art. 158(3), the applicants have an accrued right under the judgments in *Ng Ka Ling* and *Chan Kam Nga* and should not be affected by the Interpretation. This will be referred to as the "judgments previously rendered" issue.

(2) Even if they are held to be persons affected by the Interpretation, as a result of the public statements and representations made by the government to the applicants and the manner in which the *Ng Ka Ling* and *Chan Kam Nga* litigation was conducted, the applicants have a legitimate expectation, to which effect should be given, that they would receive the same treatment as the parties in those two cases and that their claims for permanent resident status would be verified according to the two judgments. This will be referred to as the "legitimate expectation" issue.

(3) Even if they fail on the first two grounds, in all the circumstances of this case, in view of the grave injustice suffered by the applicants, it would be unfair for the Director of Immigration to execute the removal orders made against the applicants and the court should prevent such an abuse of process by staying these removal orders. This will be referred to as the "abuse of process" issue.

(4) Those applicants who arrived in Hong Kong prior to 1 July 1997 are not subject to art. 22(4) of the Basic Law and the Interpretation and those who arrived between 1 July and 10 July 1997 are not affected either by the Interpretation or the No. 3 Ordinance which was held not to apply retrospectively. This will be referred to as the "Periods 1 and 2" issue.

(5) Those applicants who arrived prior to 29 January 1999 have a legitimate expectation that, provided they could satisfy the conditions contained in the Concession, they would be treated as if they were parties to the judgments in *Ng Ka Ling* and *Chan Kam Nga*. This will be referred to as the "Concession" issue.

23. According to the applicants' argument, if the first ground is sustained, all the applicants, whether they are Group A or Group B applicants and whenever they came to Hong Kong, will succeed. The same applies to the second and third grounds. The fourth ground only avails Group A applicants unless Group B applicants can show that they are unaffected by the Interpretation of art. 24(2)(3) in which case this ground would also avail them. The last ground applies only to Periods 1, 2 and 3 arrivals, whether they are Group A or Group B applicants.

24. We turn now to the first ground of appeal.

"JUDGMENTS PREVIOUSLY RENDERED" ISSUE

25. Mr Robertson QC, together with Ms Gladys Li SC and Mr S H Kwok for the applicants, submit:

(1) that the principle "judgments previously rendered shall not be affected", which is expressly incorporated in art. 158(3), applies with equal force to a free-standing interpretation given by the NPCSC under art. 158(1);

(2) that the words "shall not be affected" are to be given their natural and ordinary meaning, that is, "shall not be undermined or challenged";

(3) that the word "judgments" means the ratio decidendi or the reasons for decision or "rulings, including rights declared"; and

(4) that the principle applies here so as to protect the right of abode declared by this Court in *Ng Ka Ling* and *Chan Kam Nga* in favour of all those persons who were, at the time when the judgments were delivered, able to establish that they fell within the provisions of art. 24(2)(3) of the Basic Law.

26. The applicants' first two submissions are not in issue. It is common ground that the principle

"judgments previously rendered shall not be affected" applies to a free-standing interpretation by the Standing Committee under art. 158(1). It is also accepted by the Director of Immigration that the principle means that judgments previously given are to stand unimpaired.

27. An interpretation given by the Standing Committee on a judicial reference mandated by art. 158 (3) is nonetheless an interpretation given in the exercise of the general power of interpretation vested in the Standing Committee by art. 158(1). So the protection given to judgments previously rendered from the application of an interpretation given on a judicial reference under art. 158(3) is to be seen as an express recognition of the consequences which follow from the making of an interpretation under art. 158(1), namely, that judgments previously rendered shall not be affected. See **Lau Kong Yung** at p. 346.

28. It would make little sense to protect judgments previously rendered in the case of an interpretation made on a reference under art. 158(3) but not in the case of a free-standing interpretation. To read the protection as applying in both cases conforms with the vesting of judicial power in the courts of the Region (art. 80) and the vesting of the power of final adjudication in the Court of Final Appeal (art. 82). If a judgment of the Court of Final Appeal were not to stand unaffected by an interpretation issued under art. 158(1), the Court's power of final adjudication would to that extent be compromised. Even if such an interpretation displaces a previous judgment, as the Interpretation of 26 June 1999 did in the cases of **Ng Ka Ling** and **Chan Kam Nga**, and states the law to be applied as from 1 July 1997, the previous judgment is unaffected as a final determination of the rights of the parties to the litigation.

29. It is to be noted that the penultimate sentence in the last paragraph of the Interpretation proceeds on the footing that the principle "judgments previously rendered shall not be affected" applies to a free-standing interpretation under art. 158(1). That sentence states:

> "This Interpretation does not affect the right of abode in the [HKSAR] which has been acquired under the judgment of the Court of Final Appeal on the relevant cases dated 29 January 1999 by the parties concerned in the relevant legal proceedings."

30. We do not suggest that the question for decision here is to be answered by reference to the sentence just quoted or the last paragraph of the Interpretation. The question is to be determined by reference to the true construction of art. 158 itself. Although the Interpretation was not an interpretation of that article, the Interpretation took the view, as we do, that "judgments previously rendered shall not be affected" applies to a free-standing interpretation under art. 158(1).

31. The Director of Immigration's principal argument accepts that the words "shall not be affected" are to be read as "shall not be impaired" but takes issue with the applicants' wide interpretation of the expression "judgments previously rendered". According to the Director of Immigration, the word "judgments" in art. 158(3) is to be understood in its common law sense, signifying the formal orders (including declarations) pronounced by the courts in determining litigation and in affirming or denying the rights of the parties to the litigation. A judgment in this strict sense of the term is to be distinguished from the reasons given by a judge for his decision. (See **R v. Ireland** (1970) 44 ALJR 263; **Moller v. Roy** (1975) 49 ALJR 311 at 312-313 and also per Lord Simon of Glaisdale in **F.A. & A.B. Ltd v. Lupton** [1972] AC 634, at 658H). The word "judgment" is, however, frequently used to denote not only the judge's decision but also the reasons for decision.

32. It is this broader meaning of the word "judgment" which Mr Robertson QC seeks to turn to the applicants' advantage when he submits that the word "judgments" in art. 158(3) means the "ratio decidendi" or the reasons for decision or "rulings, including rights declared". Here the argument encounters a fundamental difficulty. In the jurisprudence of the common law, the ratio decidendi and the reasons for a decision do not bind persons who are strangers to the litigation. The importance of the ratio decidendi and the reasons for a decision is that they have a precedential value in that they

will be applied by the courts in other cases involving strangers to the earlier litigation.

33. But Mr Robertson QC disclaims reliance on the precedential value of a judgment previously rendered and he is right to do so. The penultimate sentence of art. 158(3) requires that the courts of the Region, when applying the relevant provisions, "shall follow the interpretation of the Standing Committee". The effect of this requirement is to destroy the precedential value of a judgment which has been displaced by a Standing Committee interpretation.

34. On this analysis, the applicants' argument would have two surprising consequences, if it were to be accepted. First, it would transfer the ratio and the reasoning of a decision from the realm of precedent to the area of binding judgment and would extend the binding effect of the judgment in favour of strangers to the litigation. Secondly, by giving the ratio and the reasoning this extended binding effect, the argument frustrates the intended operation of the penultimate sentence in art. 158 (3), the purpose of which is to require the Standing Committee interpretation to be followed in lieu of the judgment displaced by the interpretation.

35. In so far as the applicants' argument seeks to equate "judgments" with "rights declared", it treats the judgments as declaring rights in favour of the entire class of persons of which the plaintiffs in **Ng Ka Ling** and **Chan Kam Nga** were members, even though the rights declared in those cases were limited to the rights of those plaintiffs. The justification urged for treating the judgments in this way is the argument already rejected, namely the argument based on ratio and reasons for decision.

36. In the context of art. 158(3), namely the preservation of antecedent judgments from the effect of an interpretation which dates back to the date of commencement of the Basic Law, "judgments" should be understood in the strict sense. True it is, as the applicants' counsel points out, that the words "as between the parties" do not appear at the end of art. 158(3). But adding those words was unnecessary. A judgment of a competent court, if it is allowed to stand, finally determines and disposes of the rights of the parties to the litigation. It is their rights alone that the judgment determines. The judgment binds the parties to the litigation (who will include the class of persons represented by a representative party pursuant to a court order in the action) but not strangers to the litigation. A judgment may operate, by virtue of the doctrine of precedent, to compel a similar outcome in other like cases, but it has no binding force as between strangers to the litigation or even as between a party to the litigation and someone who is not a party to the litigation.

37. In this context, the last sentence of art. 158(3) expresses the common law principle of finality. According to that principle, a final judgment which is unappealable, or from which no appeal is taken, determines the rights of the parties for all purposes. Such a judgment cannot be re-opened by reason of a subsequent alteration in the relevant law and would, but for the judgment, alter the rights of the parties to the litigation. The judgment is unaffected by the subsequent alteration of the law.

38. It is important to note the form of the relief granted in the two decisions. In **Ng Ka Ling** this Court declared that certain parts of the Immigration Ordinance (Cap. 115) and Regulations (Cap. 115, Sub. Leg.), the Notice dated 11 July 1997 and s. 1(2) of the No. 3 Ordinance were null and void, quashed certain decisions of the Director of Immigration and declared that the plaintiffs in that case have as from 1 July 1997 been and are permanent residents of the HKSAR within the third category in art. 24(2) of the Basic Law and as such entitled to enjoy the right of abode. The declaration of right was confined to the plaintiffs in those proceedings and they were not representative parties. It was not a declaration of right in favour of anyone else. Likewise, the declaration of right made by this Court in **Chan Kam Nga** was in favour of "Each appellant" in that case and did not extend more widely. Although **Ng Ka Ling** and **Chan Kam Nga** were regarded as "representative cases", neither case was constituted by a court order to make the plaintiffs representative parties.

39. Although the applicants' written case sought to invoke other considerations in support of their

argument, notably the "test case" character of the litigation in **Ng Ka Ling** and **Chan Kam Nga**, Mr Robertson QC for the applicants disclaimed reliance upon them in relation to the art. 158 argument. They are relevant to the case based on legitimate expectation to which we now turn.

"LEGITIMATE EXPECTATION" ISSUE

Applicants' basis for legitimate expectation

40. Counsel submits that the applicants have a legitimate expectation that they would receive the same treatment as the parties in the **Ng Ka Ling** and **Chan Kam Nga** cases and that the judgments in those cases would be implemented by the Director of Immigration in their cases. It is argued that this legitimate expectation arose from the character of those two cases as "test cases" and from:

> (1) public statements made by senior government officials both before and after the two judgments;
>
> (2) representations made to individual applicants by the Director of Immigration and the Legal Aid Department; and
>
> (3) statements made and procedures adopted by judges and counsel during the course of litigation leading to those two judgments.

Counsel submits that it was the cumulative effect of these matters that gave rise to the legitimate expectation.

41. It will be necessary to examine the various statements and representations (1) to ascertain what was the message conveyed to the applicants; (2) to decide whether these statements and representations had the effect of giving rise to any legitimate expectation; and if so, (3) what was the legitimate expectation.

42. Before coming to these matters, it will be convenient for us to refer to the history of the proceedings in the two cases because what happened in the litigation had a direct impact on the statements made by the government and its agencies and on the perception of persons who were minded to assert a right of abode.

The Ng Ka Ling and Chan Kam Nga litigation

43. The litigation began with 5 actions which were commenced in early July 1997 by claimants seeking leave to apply for judicial review of the removal orders made against them by the Director of Immigration. A large number of persons were also granted legal aid for the purpose of bringing proceedings. Their cases were in the pipeline.

44. Keith J who handled the first 5 actions at first instance was conscious of the problems presented by the large number of potential cases. To hear them individually would be time-consuming, costly and unmanageable. He therefore urged the parties to select suitable cases for trial on the issues common to all those cases. Those cases would be taken as "representative cases", in the sense that the legal issues raised for the determination by the court in those cases were issues on which a decision of the court might be of interest to persons who were not parties to those cases. By agreement of the parties, 4 cases (involving 5 applicants) were chosen. They became the **Cheung Lai Wah** cases (subsequently called the **Ng Ka Ling** cases in the Court of Final Appeal). There was no request by any of the parties already before the court and no application from any person or class of persons who had not yet commenced proceedings for an order appointing the applicants in the **Cheung Lai Wah** cases as representative parties to represent these other parties or persons for the purpose of binding them to any judgment which might subsequently be given either in their favour or

against them. Nor was any such order made by the court. The first 5 actions and another 3 cases were stayed by Keith J pending the determination of the representative cases. There were injunctions granted against the Director of Immigration restraining him from removing the applicants in these other actions from Hong Kong. The Director of Immigration also undertook not to remove the actual parties in the **Cheung Lai Wah** cases and those who had been granted legal aid but had not instituted proceedings pending the outcome of the representative cases.

45. The hearing of those cases took place in September 1997. On 9 October 1997, judgment was given against the applicants. An appeal was then lodged. The Director of Immigration agreed to continue his undertaking not to remove, pending the appeal, the persons who were subject to the previous undertaking.

46. On 12 November 1997, another case involving 81 applicants was instituted. One applicant was selected by agreement of the parties to be a representative applicant. This action (which became the **Chan Kam Nga** case) related to the time of birth limitation issue in art. 24(2)(3). Again there was no court order appointing this representative applicant to represent any person or class of persons who were not then before the court. Nor was any step taken by anyone to seek such an order from the court. The Director of Immigration agreed, pending the outcome of that case, not to remove the parties therein and those applicants who had been granted legal aid and were also represented by the same firm of solicitors.

Court decisions in Ng Ka Ling and Chan Kam Nga litigation

47. The decisions in the lower courts in these two cases during this period of one and a half years influenced the attitudes of the Immigration Department and the Legal Aid Department and the way in which they handled claims for right of abode or applications for legal aid.

48. On 9 October 1997, in **Cheung Lai Wah** (later to be known as **Ng Ka Ling**), Keith J held that art. 22(4) applied to Mainland residents claiming permanent resident status under art. 24(2)(3) and that the verification scheme introduced by the No. 3 Ordinance which required applications for such status to be made in the Mainland and that the status could only be established by holding a valid travel document (i.e. a one-way exit permit) which was to be annexed to a certificate of entitlement was consistent with the Basic Law. He also held that the retrospective provision in the No. 3 Ordinance was valid.

49. On 26 January 1998, in **Chan Kam Nga**, Keith J held that the time of birth limitation provided the No. 2 Ordinance was incompatible with art. 24(2)(3) and that persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents had the right of abode in Hong Kong irrespective of whether their parents had become permanent residents by the time of their birth.

50. On 2 April 1998, the Court of Appeal in **Cheung Lai Wah** (later to be known as **Ng Ka Ling**) unanimously upheld the decision of Keith J that art. 24(2)(3) was subject to art. 22(4). However, the majority (Chan, CJHC and Nazareth, V-P) held that the retrospective provision of the No. 3 Ordinance was invalid in relation to persons who had arrived in Hong Kong before the Basic Law took effect on 1 July 1997. A different majority (Nazareth and Mortimer, VPP) held that the retrospective provision of the No. 3 Ordinance was valid in relation to persons who arrived in Hong Kong between 1 July and 10 July 1997.

51. On 20 May 1998, the Court of Appeal in **Chan Kam Nga**, reversing the decision of Keith J, held that there was a time of birth limitation in art. 24(2)(3) so that, in order to claim permanent resident status under that article, a person's parent must have already become a Hong Kong permanent resident at the time of his birth.

52. On 29 January 1999, this Court in **Ng Ka Ling**, reversing the decisions of Keith J and the Court

of Appeal, held that art. 22(4) did not qualify art. 24(2)(3) and that persons claiming permanent resident status under art. 24(2)(3) were not subject to the approval of the Mainland authorities. The verification scheme introduced by the No. 3 Ordinance was therefore invalid insofar as it required a one-way exit permit to be annexed to the certificate of entitlement. But this Court upheld that part of the scheme which required an application for permanent resident status to be made only in the Mainland and held that the retrospective provision in the No. 3 Ordinance was invalid.

53. On the same day, this Court in **Chan Kam Nga**, held that the time of birth limitation in the No. 2 Ordinance was inconsistent with art. 24(2)(3) and invalid.

Events following Court of Final Appeal decisions in the two cases

54. Immediately after these two judgments, the government publicly stated that it would implement this Court's decisions. It set up a task force for that purpose and started negotiations with the Mainland authorities on the new procedures for verifying right of abode claims. A study was conducted to estimate the number of persons eligible under art. 24(2)(3) as interpreted by this Court and to assess the demands on various social services and the financial implications thereof. According to the results of the government survey, there were 692,000 persons in the Mainland who would be eligible in the first generation and another 983,000 persons in the second generation.

55. The applicants criticise the methodology of this survey as unreliable and the figures as grossly exaggerated. It is said that the number of persons affected by the Court's decisions, after having discounted illegitimate children, those in the second generation and those who would not settle in Hong Kong, would only be 365,400 and, if the figures from an earlier government survey conducted in 1995 were to be accepted (and which the applicants suggested might be adopted), the number would only be in the region of 129,800. It is clear that the exact figures can never be known.

56. The dispute over the methodology of the survey and the accuracy of the figures only highlighted the uncertainty and hence the difficulty which the government faced in trying to implement the Court's decisions. The government considered that this was a problem with which the HKSAR could not cope. Having consulted the Executive and Legislative Councils, it decided to seek an interpretation by the NPCSC on arts. 22(4) and 24(2)(3) which would displace **Chan Kam Nga** and that part of the decision in **Ng Ka Ling** that held that art. 22(4) did not qualify art. 24(2)(3) and that persons claiming permanent resident status under art. 24(2)(3) were not subject to the approval of the Mainland authorities.

57. On 26 June 1999, the NPCSC issued the Interpretation.

General statements by senior government officials

(1) Prior to 29 January 1999

58. These statements were made mainly between July and October 1997 by senior government officials, including the Chief Executive, the Chief Secretary, and the Director of Immigration. A large number of Mainland born applicants who were granted legal aid then pursued their claims to have permanent resident status in Hong Kong and challenged the constitutionality of the immigration legislation. In order to allay community concern in the early days after the change of sovereignty, government officials sought to make the government's position clear to the public.

59. The representations contained in these statements can be summarised as follows:

> (1) the government would enforce the immigration legislation and those who could not establish their status would be repatriated; (Government spokesman on 3 July 1997; Director of Immigration on 13 July 1997);

(2) the government would uphold the law and people were free to take the government to court;

(Chief Executive on 12 July 1997);

(3) the government would try its best to defend the case in accordance with the law;

(Director of Immigration on 13 July 1997; Chief Executive on 31 July and 22 October 1997);

(4) if the government should lose the case, "it will amend the legislation according to the judgment";

(Director of Immigration as reported in the "Oriental Daily" on 13 July 1997); and

(5) the government would do what the court eventually decides; it would abide by the rulings of the court;

(Chief Executive on 23 July, 31 July and 22 October 1997)

60. The first of the three statements made by the Chief Executive referred to in (5) above was made in a media session on 23 July. In response to a question, the Chief Executive said

"We are a community very much of (the) rule of law so these challenges are natural, expected. We would do what the court eventually decides ....."

61. The second statement was made in a speech to the Australian Chamber of Commerce on 31 July. The Chief Executive said

"We are expecting another challenge soon concerning mainland-born children with Hong Kong parents. All of these challenges have been, and will continue to be, dealt with by our own courts ..... It shows that the Hong Kong SAR Government will argue its case in court, and abide by the court's ruling."

62. The third statement on 22 October 1997 was made in a speech delivered at Chatham House, London. The Chief Executive, after referring to legal challenges and the rule of law, said

"The Government has been and will, no doubt, continue to be challenged in court. What is important is that legal challenges are and will continue to be dealt with by the courts in Hong Kong. The Government will argue its case in court and abide by the rulings."

63. Apart from the public statements already mentioned, two other statements should be mentioned. On 13 July 1997, when the Chief Executive was asked whether the Immigration Ordinance would be sent to the NPCSC for interpretation to clarify whether it was consistent with the Basic Law, he answered that the government's consideration had been comprehensive and that there was no need for the NPCSC to be asked for a ruling beforehand. This answer did no more than convey the impression that the government was confident that its position was correct.

64. On 23 July 1997, the Chief Secretary for Administration, who is responsible for the Legal Aid Department at Legislative Council meetings, was asked about the financial implications of the large number of applications for legal aid, the reason why the Legal Aid Department would not wait for a court ruling on the first case of this nature before processing other applications and whether the present arrangement would increase the workload of the courts. The Chief Secretary replied:

> "So far, 73 cases have been granted legal aid. However, with the agreement of the courts and both sides, a few cases will be selected as test cases to obtain rulings from the courts on points of law. *It is therefore unnecessary to initiate separate proceedings for each and every legally aided person*. It is difficult to estimate the costs of litigation at this stage as it depends on the number of selected cases, their complexity and whether there will be any appeals arising from such cases. The Department will closely monitor the expenditure in these cases.
>
> All applications for legal aid must be processed expeditiously in accordance with the Legal Aid Ordinance (Cap. 91). Delay in processing an application may jeopardise the interests of eligible applicants. It is expected that the few test cases would not overburden the court." (emphasis added)

The statement that it was unnecessary to initiate separate proceedings for each legally aided person was designed to indicate that the financial burden on the government would be limited. It was not a statement made in order to induce other persons, whether applicants for legal aid or not, to refrain from commencing proceedings. This was indeed the understanding of the press as reflected in the reports on the following day in the Oriental Daily and Ming Pao. It is that understanding that the reasonable reader would have gained from the newspaper reports.

(2) Post 29 January 1999

65. After the Court of Final Appeal decisions, the community was naturally anxious to know what the government would do. Various public statements were made by senior officials in the aftermath of the two judgments. These statements can be summarised as follows:

> (1) the government respects the court rulings and would abide by and implement such rulings;
>
> (Secretary for Security on 29 January 1999; Chief Executive on 30 January 1999; Acting Chief Executive on 30 January 1999 and 5 February 1999; Secretary for Security on 30 January 1999; Convenor of Executive Council on 1 February 1999; Government spokesman on 2 February 1999);
>
> (2) the government would hold discussions with the Mainland authorities on the steps to be taken;
>
> (Secretary for Security on 29 and 30 January 1999; Convenor of Executive Council on 1 February 1999);
>
> (3) the government would assess the implications on the various services on the community;
>
> (Secretary for Security on 29 January 1999; Chief Executive on 30 January 1999; Acting Chief Executive on 30 January 1999; Convenor of Executive Council on 1 February 1999; Acting Chief Executive on 2 February 1999); and
>
> (4) the government had been processing applications in accordance with the Court of Final Appeal judgments.
>
> (Law Officer on 19 May 1999).

Specific representations by government agencies

(1) By Immigration Department/Secretary for Security

66. The specific representations alleged to have been made by the government which are said to have given rise to a legitimate expectation take the form of written replies given to applicants for right of abode upon their inquiries addressed either to the Immigration Department or some other government officials, such as the Chief Executive and Secretary for Security. Apart from making reference to the applicable law at the time, the standard reply (subject to slight variations in wording in individual cases) from the Immigration Department to individual applicants contained the following passage:

> "The SAR government has appealed against the High Court's decision on 26 January 1998 that children born outside of Hong Kong before their parents became HK permanent residents also have right of abode if their father or mother received HK permanent resident status afterwards. As litigation is ongoing, applications of persons in this category cannot be given decisions for the time being."

It is alleged that this reply had the effect of inducing the applicants not to take any step to lodge a claim until the court case had been finally determined. Had they taken action, it is submitted, they would have been in the same position as the parties in the **Ng Ka Ling** and **Chan Kam Nga** litigation. The message given in a reply from the Secretary for Security dated 24 April 1998 in response to a letter of inquiry (by RA13) was more explicit :

> "The Court of Appeal will hear the case on 1 May. After the whole litigation process is completed, the Immigration Department will follow the final judgment of the Courts in dealing with the applications for the Certificate of Entitlement."

(2) By Legal Aid Department

67. As lawyers for a litigant in a legal proceeding, the Legal Aid Department is of course independent of the government. As an organisation charged with the obligation to implement the provisions of the Legal Aid Ordinance, it is clearly acting in the capacity of a government department. Whether statements made in these cases by the Legal Aid Department to persons granted legal aid or seeking legal aid are to be attributed to the government is a matter in issue in these appeals. In our view, this question should be answered in the affirmative. As will appear, the Legal Aid Department acted in these cases in conjunction with the Immigration Department in various aspects of the litigation. The Legal Aid Department made statements about the precedential effect of the "test cases" and sought to discourage applicants for legal aid from commencing or joining in proceedings, in order to keep the volume of litigation within reasonable bounds and to conserve costs. In these respects, the Department was serving the government's interests as well as the claimants' interests.

68. From early July 1997, the Legal Aid Department accepted a large number of applications for legal aid by Mainland born children of Hong Kong permanent residents to assist them to institute proceedings in order to quash the removal orders made against them and/or to claim permanent resident status. In the month of July, there were 1,300 such applications. Some of the applicants who were granted legal aid were assigned to Messrs Clarke & Liu. Conscious of the large number of claimants involved and the fact that the cases were to be litigated at public expense, the Legal Aid Department, the assigned solicitors and counsel held discussions with the Department of Justice acting for the Immigration Department to explore the possibility of using a few test cases to seek the determination of the court on issues common to these and other claimants. This was also the intention of the court as expressed at a directions hearing on 21 July 1997. As a result, the **Cheung Lai Wah** (later to be known as **Ng Ka Ling**) cases were selected as "representative cases". At that time, senior officials of the Legal Aid Department stated, as reported in the press on 15, 20 and 29 July 1997, that the court's decisions in the representative cases would become a precedent for similar

cases and that there was no need to hear all of the cases (in which legal aid had been granted).

69. In late July or early August, upon advice from senior counsel that their claims would not succeed, the legal aid certificates granted to the **Chan Kam Nga** class of claimants were discharged. Subsequent appeals to the Master were dismissed and applications for legal aid from claimants in this class were refused or discouraged.

70. In early August 1997, as the Director of Immigration was then only prepared to give an undertaking not to remove persons who had been granted legal aid, the Legal Aid Department had to vet all the applications. Applicants were required to produce some supporting documents in order that their applications for legal aid could be processed. Hence, the Legal Aid Department could make an initial assessment of the merits of the applications. By 1 September 1997, a total of 1461 applications had been received. Legal aid was granted in 901 cases and refused in 411 cases. The remainder were being processed. Towards the end of September 1997, the Legal Aid Department stopped granting further legal aid certificates. The reason given was that the new cases involved no fresh legal issues not already covered by the pending cases. Applicants for legal aid were, however, recorded as having made applications which were being processed. Each of them was given a pink card.

71. As a result of this change of policy, the Legal Aid Department secured an arrangement with the Director of Immigration in mid October 1997 whereby the Director of Immigration undertook not to remove those persons who had applied for (but were not granted) legal aid and whom the Legal Aid Department had considered as having a meritorious case. These persons were no different from those who had previously been granted legal aid and had been assigned a solicitor to pursue their claims. Thereafter, the Legal Aid Department from time to time submitted lists of meritorious applicants to the Director of Immigration asking the Director of Immigration to inform the Legal Aid Department in case a removal order was to be made against any of these applicants. Up to 11 January 1999, there were a total of 422 of such persons.

72. In November 1997, over 70 persons in the **Chan Kam Nga** category had privately instructed Messrs Pam Baker & Co. to commence proceedings to test the time of birth limitation issue. When they were granted leave to apply for judicial review, legal aid was granted to them. The Director of Immigration had also agreed not to remove those applicants pending the outcome of that case. A total of 109 applicants were within this category, but only 79 were able to comply with the conditions which the Director of Immigration imposed and benefit from such undertaking. There were ultimately 81 applicants in the **Chan Kam Nga** case.

73. In respect of applicants whose legal aid applications were still pending, the Legal Aid Department informed the Director of Immigration of the applications and requested the Director of Immigration to notify the Department of any removal order which might be made against any of the applicants.

74. In December, 1998, shortly before the hearing of **Ng Ka Ling** and **Chan Kam Nga** in the Court of Final Appeal, there was another surge in the number of applications for legal aid for right of abode claims. On 7 December 1998, the Legal Aid Department introduced a registration system whereby only urgent cases, including those in which the applicants were under detention or in danger of being removed, were screened. For other cases, those who were able to provide personal particulars and supporting documents were registered. Each applicant was sent a pro forma reply which, subject to immaterial variations, stated:

> "Regarding your application for legal aid, please note the following matters:
>
> (1) Extension of stay ...

....

(2) Right of abode

As your application for legal aid relates to legal matters that are being heard in the Court of Final Appeal at this time, there is accordingly no need to bring individual cases for litigation at this stage."

We shall refer to these replies as "the Legal Aid pro forma replies".

75. After the judgments of the Court of Final Appeal, in February 1999, the Legal Aid pro forma replies were replaced by white cards or slips of paper acknowledging that applications for legal aid had been made.

76. Between 7 December 1998 and 29 January 1999, the Legal Aid pro forma replies were sent to over 1,000 persons seeking legal aid. The list of these people were sent to the Immigration Department about a year later in December 1999. The Legal Aid Department requested the Director of Immigration to consider these applicants as falling within the Concession. This was refused by the Director of Immigration who only agreed to verify those cases falling within the Concession according to the terms of the Concession.

77. The applicants' complaint is that, by withholding their applications for legal aid and/or representing to them that there was no need to take separate legal proceedings, the Legal Aid Department represented that their cases would be treated as if they were parties to the **Ng Ka Ling** and **Chan Kam Nga** cases and that they would benefit from the two judgments. The importance of this representation, according to the applicants, is that it operated as an inducement not to take the very action which would have resulted in securing the protection given by art. 158 to judgments previously rendered.

"Test cases"

78. The applicants submit that the procedure adopted in the **Ng Ka Ling** and **Chan Kam Nga** litigation and the statements made by judges and government officials in the course of such litigation are also matters which, together with the general and specific representations already mentioned, gave rise to the legitimate expectation that the applicants would be treated in the same way as parties to those two cases. The **Ng Ka Ling** and **Chan Kam Nga** cases had been regarded by the parties, the Legal Aid Department, counsel and the court as "test cases", as appears from the following circumstances :

(1) at the suggestion of Keith J, a few representative cases were selected and other cases were stayed pending the outcome of those representative cases;

(2) government officials including the Legal Aid Department described these as "test cases" in public statements;

(3) no legal aid certificate was granted to claimants to institute new cases which involved the same or similar legal issues;

(4) in his judgments, Keith J referred to the representative cases as "in the nature of test cases" and made no orders for costs; and

(5) other judges in their judgments also mentioned the possible impact of their decisions on many other claimants.

These facts, it is alleged, had led the applicants to believe that the determination by the courts in these "test cases" would settle the same issues for all potential claimants for the right of abode.

79. Keith J's suggestions and directions were made in the context of case management of those cases for the purpose of "keeping costs at a minimum, while at the same time ensuring that all relevant legal issues are decided". He did not say that right of abode claimants would be treated as if they were litigants in the cases before the court. Nor did he direct his remarks to the question whether any person should or should not commence proceedings.

80. In **Ng Ka Ling** and **Chan Kam Nga**, the questions at issue were contentious questions of public law. They were understood generally to be "test cases". It could be assumed that the principles declared, being the answers to the questions of law, in the test cases would be applied to persons in a similar position. That result would come about because effect would be given by the government and its agencies in other cases to the decisions and, if need be, by the courts applying the doctrine of precedent. As to test cases generally, see **R v. Hertfordshire County Council, Ex parte Cheung**, The Times, 4 April 1986, at p.12 and **R v. Secretary of State for the Home Department, Ex parte Bajram Zeqiri** [2001] EWCA Civ 342, at para. 43, currently under appeal to the House of Lords with judgment reserved.

Representations viewed in context of the "test case" character of Ng Ka Ling and Chan Kam Nga

81. The matters relied on by the applicants to support a legitimate expectation fall broadly into two categories: (1) general representations made to the public by the government and its agencies and (2) specific representations made to individual applicants by the Immigration Department and Legal Aid Department as government agencies. These representations were made before and during the **Ng Ka Ling** and **Chan Kam Nga** litigation in connection with the applicants' claim for right of abode and their pursuit for such right in the courts. They must therefore be viewed in the context of the test case character of that litigation.

General representations

82. In our view, apart from the statement made by the Director of Immigration as reported in the Oriental Daily on 13 July 1997 and the three statements made by the Chief Executive on 23 July, 31 July and 22 October 1997, the general statements made by and on behalf of the government in the period before and during the proceedings in those cases up to the time of delivery of judgment by this Court were of no significance and may be put aside. The same applies to the general statements made after the delivery of the judgments. They said nothing more than any responsible government would say, namely, it respects the rule of law. They could not generate a legitimate expectation of the kind asserted by the applicants.

83. The statement by the Director of Immigration on or about 13 July and the three statements by the Chief Executive stand in a different category. It is not disputed that all four statements received considerable publicity in Hong Kong. While two of the Chief Executive's statements were directed to an international or overseas audience (the Chatham House speech and the Australian Chamber of Commerce speech), they were made in circumstances in which they were bound to attract considerable publicity in Hong Kong and they had the same effect as the Director of Immigration's statement and the Chief Executive's statement in the media session on 23 July 1997. All four statements expressly recognised the consequences that flow from the test case character of the two cases. In other words, in the context in which they were made, the statements amounted to representations that the government would abide by the ultimate outcome in the courts and would carry into effect the court decisions, applying them in other like situations. It is not to the point that the speakers may not have intended their statements to be acted on. The only point is : what did they mean?

Specific representations

84. The specific representations in the Legal Aid pro forma replies (see para. 74) sent to individual applicants for legal aid go further because they contained the further statement that it was unnecessary for the recipient of the reply to commence further proceedings or join in proceedings. In other words, the replies represented that it was unnecessary to take the very action which, if taken, would have resulted in attaining the protection given to judgments previously rendered by art. 158 of the Basic Law. The inducement was the earlier statement that the government would abide by the outcome in the test cases.

85. The statement made in the standard reply sent by the Immigration Department to applicants for the right of abode (see para. 66), following the High Court decisions, did no more than state that, as the litigation was ongoing, decisions on applications for right of abode could not be made for the time being. They contained no representation that the decisions would be implemented.

86. But the reply dated 24 April 1998 from the Secretary for Security to RA13 (see para. 66) contained a clear representation that the Department of Immigration "will follow the final judgment of the Courts in dealing with applications for certificate of entitlement". That representation is not as strong as that contained in the Legal Aid pro forma replies because it contains no statement that it is unnecessary for the recipient to commence or join in proceedings. But it does contain a clear statement that applications for certificates of entitlement would be dealt with according to the final judgment of the courts.

The doctrine of substantive legitimate expectation

87. Before we come to grips with the arguments of the parties on this aspect of the case, it will be useful to state shortly how judicial review for substantive unfairness in the context of legitimate expectation has developed in recent times, more particularly in a context in which government or a public authority changes an earlier policy which has given rise to a legitimate expectation.

88. The concept of "legitimate expectation" has had a relatively brief but dynamic history in the English common law. First introduced by Lord Denning MR (**Schmidt & another v. Secretary of State for Home Affairs** [1969] 2 Ch 149 at 170-171), its initial purpose was to extend the range of rights and legal interests which might be affected by an administrative determination so as to attract the rules of natural justice. For some time, the concept was employed to extend the range of situations in which an administrative decision-maker comes under a duty to accord procedural fairness to a person likely to be affected by the decision. So undertakings and representations by public officials as to future conduct, which generated a legitimate expectation that the undertakings or representations would be honoured, gave rise to a duty on the decision-maker to give persons to whom the statements were addressed an opportunity to be heard before arriving at a decision adverse to their interests.

89. It was only natural that the question would eventually arise as to whether the courts would order or allow protection of a substantive legitimate expectation. At first, the issue was controversial. Early attempts to review for substantive unfairness an administrative decision which denied a legitimate expectation on policy grounds were rebuffed by the English Court of Appeal (**R v. Secretary of State for the Home Department & another, Ex parte Hargreaves** [1997] 1 WLR 906 at 921, 924-925). The Court of Appeal held that judicial review in such cases was limited to *Wednesbury* unreasonableness.

90. Since then, however, the Court of Appeal in a series of decisions has decided that judicial review for substantive unfairness is not so limited and that, in a case where official conduct has generated a legitimate expectation of a substantive benefit, an administrative decision based on government policy which frustrates the expectation may be reviewable on wider grounds, in particular

substantive unfairness and abuse of power (**R v. North and East Devon Health Authority, Ex parte Coughlan** [2000] 2 WLR 622; **R v. Secretary of State for Education and Employment, Ex parte Begbie** [2000] 1 WLR 1115; **R v. Secretary of State for the Home Department, Ex parte Bajram Zeqiri; R v. The London Borough of Newham and Manik Bibi and Ataya Al-Nashed** [2001] EWCA Civ 607.

91. The doctrine of substantive legitimate expectation has not been examined by the House of Lords. There were references to the doctrine, as explained by Lord Woolf MR in **Coughlan**, in the speeches of Lord Steyn and Lord Hobhouse of Woodborough in **R v. Secretary of State for the Home Department, Ex parte Hindley** [2001] 1 AC 410 at 419 and 421 (where Lord Hobhouse described Lord Woolf's judgment as "valuable"). As we read them, the speeches in **Hindley** do not cast doubt on the doctrine. We accept, as do the arguments presented to us in this case, that the doctrine forms part of the administrative law of Hong Kong. As such, the doctrine is an important element in the exercise of the court's inherent supervisory jurisdiction to ensure, first, that statutory powers are exercised lawfully and are not abused and, secondly, that they are exercised so as to result in administrative fairness in relation to both procedural and substantive benefits (see **Coughlan**, at 875-876).

92. The doctrine recognizes that, in the absence of any overriding reason of law or policy excluding its operation, situations may arise in which persons may have a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court. Generally speaking, a legitimate expectation arises as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority. See, e.g. **Attorney-General of Hong Kong v. Ng Yuen Shiu** [1983] 2 AC 629 and **R v. Secretary of State for the Home Department, Ex parte Ruddock & others** [1987] 1 WLR 1482.

93. Central to an understanding of judicial review of decisions made within a statutory and constitutional framework where government policy is engaged is that the government or the relevant government agency must remain free to change its policy. (**R v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan** [1984] 1 WLR 1337 at 1347; *Coughlan* at 647). Likewise, its undertakings are open to modification or abandonment, subject to judicial review by the court (**Coughlan** at 647). But the adoption of a new policy does not relieve a decision-maker from his duty to take account of a legitimate expectation.

94. As the relevant principles of law applying to judicial review for substantive unfairness have been evolving in the course of the four very recent decisions, it is convenient to refer to **Bibi** because it contains a summary of the law as it has developed to this point and because the applicants' argument is based upon the propositions which it states. First, the law requires that a legitimate expectation arising from a promise or representation, the expectation being that the promise or representation would be honoured, be properly taken into account in the decision-making process so long as to do so falls within the power, statutory or otherwise, of the decision-maker. We give emphasis to the qualification because its application in this case is of critical importance, as will appear later. If the expectation is not taken into account, the decision-maker abuses his power and acts unlawfully (*Bibi*, paras. 39 and 51).

95. Secondly, unless there are reasons recognised by law for not giving effect to legitimate expectations, then effect should be given to them. Where the conduct of the public official has given rise to a legitimate expectation, then fairness requires that, if effect is not given to the expectation, the decision-maker should express its reasons so that they may be tested by a court in the event that the decision is challenged (*Bibi*, para. 59).

96. Thirdly, even if the decision involves the making of a political choice by reference to policy

considerations, the decision-maker must make the choice in the light of the legitimate expectation of the parties (*Bibi*, para. 64).

97. Fourthly, it follows that if the decision-maker does not comply with the third requirement just stated, the decision will be vitiated by reason of failure to take account of a relevant consideration. The failure to take account of the legitimate expectation constitutes an abuse of power. Once the court has established such an abuse, it may ask the decision-maker to exercise his discretion by taking the legitimate expectation into account (*Bibi*, para. 41).

98. We would add the qualification "usually" to the statement in the preceding paragraph of the fourth proposition. We do so because the jurisdiction to review an administrative decision for failure to take account of a relevant consideration will only be exercised when the decision is materially affected by that failure. (**Lau Kong Yung** at 331 C-D, applying **R v. Hull University Visitor, Ex parte Page** [1993] AC 682 at 702 B-C; **Nguyen Tuan Cuong & others v. The Director of Immigration & others** [1997] 1 WLR 68 at 77B; **R v. Cambridge Health Authority, Ex parte B** [1995] 1 WLR 898 at 907 B-C). It is only in an exceptional case that the court will be satisfied that the failure to take account of a relevant consideration has not affected the decision (**Gransden & Co. Ltd. & another v. Secretary of State for the Environment & another** (1985) 54 P & CR 86 at 94). But once the court is satisfied that the outcome would not have been different had the relevant consideration been taken into account, the decision will not be quashed. The Director of Immigration relies strongly on this proposition. Its application raises another important issue to which we shall return later.

99. In *Bibi*, where the Housing Authority had made a promise to the applicants and others of providing legally secure housing accommodation within 18 months, the English Court of Appeal held that the Authority had acted unlawfully in failing to take into account the applicants' legitimate expectation arising from the Authority's promise. The Court went on to declare that the Authority was under a duty to consider the applicants' applications for suitable housing on the basis that they had a legitimate expectation that they would be provided by the Authority with suitable accommodation on a secure tenancy. By making a declaration in this form, the Court avoided taking the decision into its own hands and left the actual decision to be made with the Authority. In this way, the Court, in conformity with the doctrine of the separation of powers and the legislative intent, left the making of the decision with the body in which it has been vested by the relevant legislation.

The applicants' argument on substantive legitimate expectation

100. The applicants submit that the Director of Immigration, in making orders for removal in those cases in which such orders have been made, failed to take account of the applicants' legitimate expectation, which by law, he was bound to do, with the result that the orders should be quashed. The applicants then submit that this Court should exercise the relevant discretion itself or, in the alternative, leave it to the Director of Immigration to exercise his discretion in accordance with law. Mr Robertson QC for the applicants accepts that it is a case in which it would be appropriate for the Director of Immigration to exercise his discretion, in the event that the applicants make out a case for relief.

The legitimacy of the expectation considered in the light of the representations

101. In making out a case for relief in accordance with the principles stated above, the applicants must first establish the existence of a legitimate expectation on their part. Though the concept of "legitimate expectation" is somewhat lacking in precision, it is now firmly established that to be legitimate, the expectation must be reasonable (**Attorney-General of Hong Kong v. Ng Yuen Shiu** [1983] 2 AC 629 at 636, per Lord Fraser of Tullybelton), that is, reasonable in the light of the official conduct which is said to have given rise to the expectation. Whether an expectation is legitimate in this sense depends, at least in part, upon the conduct of the relevant public authority and what it has

committed itself to. Whether an expectation is legitimate, and to what extent, must also depend upon what the applicants are *entitled* to expect. The requirement of legitimacy means that judicial decisions "must be founded not only on what the claimant *factually* expected, but also on what the claimant, bearing in mind any relevant considerations of policy and principle, was *entitled* to expect". (For an illuminating discussion, see Mark Elliott, "The Human Rights Act 1998 and the Standard of Substantive Review" [2001] The Cambridge Law Journal 301, especially at 319). It follows that, to the extent that an expectation of a benefit which cannot legally be accorded, it is not a legitimate expectation. As noted earlier, this question is a critical question in this case.

102. The conduct relied on here consists of representations, made in the context of the "test case" character of the **Ng Ka Ling** and **Chan Kam Nga** litigation. It is not necessary that the representations should be express. An implied representation will, in appropriate circumstances, generate a legitimate expectation (**R v. Gaming Board of Great Britain, Ex parte Kingsley** [1996] COD 241 at 242).

103. The Director of Immigration submits, however, that a representation must be clear and unambiguous before it can establish a legitimate expectation. This submission was accepted by the courts below and there is a substantial body of authority to support it (**R v. Inland Revenue Commissioners, Ex parte MFK Underwriting Agents Ltd. & others** [1990] 1 WLR 1545 at 1569-1570; **R v. Jockey Club, Ex parte RAM Racecourses Ltd.** [1993] 2 All ER 225 at 236; **R v. Devon County Council, Ex parte Baker & another** [1995] 1 All ER 73 at 88 (cited with evident approval in **Coughlan** at 651); **R v. Commissioners of Inland Revenue, Ex parte Unilever plc** [1996] COD 421 at 423 (where the "requirement for an unqualified and unambiguous was described as "fundamental"); **The Hong Kong and China Gas Co. Ltd. v. The Director of Lands** [1997] HKLRD 1291 at 1296-1297). In the light of this body of authority, the submission made by the applicants that, in the event of ambiguity, the representations must bear the construction most favourable to the applicants, must be rejected.

104. While we accept that, generally speaking, a representation relied upon to support a legitimate expectation must be clear and unambiguous, we recognise that there will be cases where a representation is reasonably susceptible of competing constructions. In such a case, far from adopting the construction which is most favourable to the person asserting the legitimate expectation, the correct approach is to accept the interpretation applied by the public authority, subject to the application of the *Wednesbury* unreasonableness test. In **R v. Ministry of Defence, Ex parte Walker** [2000] 1 WLR 806, Lord Slynn of Hadley, speaking with reference to the phrase "military activity" in the government compensation scheme said (at 813):

> "If I had come to the view that this phrase was imprecise enough for several meanings to be adopted, then I would not accept that the minister's interpretation of it was such as to be 'so aberrant that it cannot be classed as rational' (*Reg v. Monopolies and Mergers Commission, Ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 at 32H, per Lord Mustill)."

Such an approach should be adopted in cases where the representation is as to government policy. Generally speaking, no unfairness can arise when government acts on a rational view of its policy statements. Policy statements are often expressed in broad terms, leaving the details to be worked out. To say that, because they are broadly and imprecisely expressed, such statements can never generate a legitimate expectation would be too restrictive an approach. But in cases where the details of a broad policy are subsequently identified or ascertained and they reflect a rational development of the broad policy earlier announced, the court should have regard to them.

105. In the present case, as already explained, the representations fall into three categories. The first category consists of the four general statements by the Director of Immigration and the Chief Executive, addressed to the public at large (see para. 83), that the government would abide by the

decisions of the courts. That representation means that the government will accept and carry into effect what the HKSAR courts ultimately declare the law to be. In other words, the representation amounted to a clear and unambiguous statement that the government would treat persons who fell within this category as if they were parties to the litigation. The representation did not make any reservation or qualification for the possibility that the Standing Committee would issue an interpretation under art. 158(1), the effect of which would be to affect the decisions of the HKSAR courts. That possibility was never adverted to. With respect to the judges in the courts below, we disagree with their conclusion that the representations did not mean that the government would treat persons in the relevant categories as if they were parties to the litigation.

106. The second category of representations are those contained in the Legal Aid pro forma replies sent to applicants for legal aid in which the Legal Aid Department not only makes the statement that the government will accept and carry into effect what the HKSAR courts declare the law to be but also states that it is unnecessary to join in existing proceedings or commence fresh proceedings. Here the representation about the government's future conduct is held out as an inducement to refrain from taking action, a course which is stated to be unnecessary. By these replies, the Legal Aid Department sought to induce the recipients of the replies not to take the very action which, if taken, would have brought them within the protection given to "judgments previously rendered". Here again the representation is clear and unambiguous. And it is stronger than the first representation because it expressly invites reliance upon the government's announced policy instead of bringing proceedings.

107. The letter of 24 April 1998 sent by the Secretary for Security to RA13 falls into a separate category, somewhere between the general representations made by the Director of Immigration and the Chief Executive on the one hand and the Legal Aid pro forma replies on the other hand. The letter of 24 April 1998, being specifically directed to an applicant for right of abode and stating how it would be dealt with, is unquestionably stronger than the general representations. Because it contains no statement about commencing or joining in proceedings, it is not as strong as the Legal Aid pro forma replies. For reasons which will become apparent later, the distinction between the general representations and the specific representations is of critical importance.

108. In the case of all three categories of representation, the expectation they generated is the same, namely, that persons in these categories will be treated as if they were litigants in the **Ng Ka Ling** and **Chan Kam Nga** cases respectively, although, as just explained, the strength of the expectation varies according to the particular category of representation from which the expectation arises. The classes of persons entitled to the benefit of the expectation arising from the representations in the 2nd and 3rd categories are very much more limited than the class entitled to the benefit of the more general representations. This difference is of great importance to the outcome of these appeals, as will appear.

109. In referring to those who are entitled to the benefit of an expectation, an important question is whether reliance or detriment must be shown by those asserting a legitimate expectation in order to take the benefit of the representations. It has been said that, in cases where the government has made known how it intends to exercise its powers which affect a significant section of the community, it may be held to its word, whether an applicant specifically relies upon it or not (see *Begbie*, at 1133, per Sedley LJ where his Lordship refers to powers "which affect the public at large"; see also *Bibi*, at paras. 28-32). It has also been said that reliance, "though potentially relevant in most cases, is not essential" (*Bibi*, at para. 28). On the other hand, the view has been expressed that "[i]t is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation" (*Begbie***,** at 1124, per Peter Gibson LJ).

110. We do not find it necessary to explore the important question whether detrimental reliance may be necessary to ground a legitimate expectation, particularly in relation to the very large innominate class of persons to whom the general representations were made. So far as the specific representees are concerned, no issue as to reliance arises because the representations were calculated to induce

reliance and it is to be assumed in the circumstances that they had this effect.

111. Subject to a consideration of the Director of Immigration's argument that the expectation generated by both the general and specific representations is not legitimate because it is contrary to law, the expectation was reasonable in the sense described earlier. The expectation resulted directly from clear and unambiguous representations which were made in the context of the "test case" character of the **Ng Ka Ling** and **Chan Kam Nga** litigation. Further, in the case of the specific representations they were made in circumstances in which they were calculated to induce the representees to rely upon them.

The legitimacy of the expectation considered in the light of the Director of Immigration's argument that enforcement of the expectation would be contrary to law

112. The Director of Immigration submits that the applicants' expectation is not legitimate or that it cannot be substantively enforced because substantive enforcement would be contrary to law. The principle that the court will not give effect to a legitimate expectation where to do so would involve the decision-maker acting contrary to law is fundamental (**Attorney-General of Hong Kong v. Ng Yuen Shiu** at 638; **Coughlan** at 647, 651, 656; *Begbie* at 1125, 1132). Consistently with this principle, the decision-maker cannot give effect to an expectation by exercising his statutory discretion "in a way which undermines the statutory purpose" (*Begbie,* at 1132, per Sedley LJ).

113. Immediately following the decisions of this Court in **Ng Ka Ling** and **Chan Kam Nga**, it was not possible for the applicants to establish their claimed right of abode. This was because, in **Ng Ka Ling**, this Court had struck out paragraphs A(i) and B of the notice in the Gazette under s. 2AB(2)(a) of the No. 3 Ordinance. It was the notice which specified the way in which an application for a certificate of entitlement was to be made. Paragraph A(i) stated that an application by a person residing in the Mainland at the time of application must be made "through the Exit-Entry Administration of the Public Security Bureau in the district where he is residing". Paragraph B stated that an application by such a person for an exit permit to Hong Kong and Macau made to the Exit-Entry Administration of the Public Security Bureau under the laws in force in the Mainland for settlement in Hong Kong may be regarded as an application for a certificate of entitlement in Hong Kong. In **Ng Ka Ling**, this Court said of the striking out of the two paragraphs in the notice ((1999) 2 HKCFAR at 38) :

> "This leaves a gap in the Notice as to whom an application for a certificate of entitlement should be made by a Mainland resident. The Director would have to specify a new arrangement for them by notice."

114. In **Lau Kong Yung**, Li CJ described the situation that then prevailed in these terms ((1999) 2 HKCFAR at 314) :

> "I shall for convenience use the phrase 'the modified scheme' to refer to the scheme that existed after the Court's judgment declaring as null and void the relevant provisions in the No. 3 Ordinance and the Notice.
>
> After the Court's judgment, the modified scheme was unworkable in relation to claimants resident on the Mainland. This was because the Court had declared null and void paras. A(i) and B of the Notice. Thus, there was a gap. The Director needed time to work out a new arrangement to fill this gap. This involved discussions with the Mainland authorities. In the present case, the Judge held that the task involved was complicated and extremely difficult and that the Government must be given a reasonable time which had not expired. No challenge to this finding was made on appeal. The Court of Appeal agreed with it.

> It was common ground in this Court and the Courts below and accepted by those Courts that, in the meanwhile, the Director could not process any application for a certificate of entitlement by claimants resident on the Mainland."

115. So, before the Interpretation issued on 26 June 1999, it was not possible to give effect to the applicants' expectation under the modified scheme because there was a gap in that scheme that had not been filled by the Director of Immigration. But as the Director of Immigration had power to fill that gap by notice under s. 2AB(2)(a) of the No. 3 Ordinance, giving effect to the applicants' expectation was not, at that stage, contrary to law.

116. The Director of Immigration submits, however, that this position changed once the Interpretation issued. When that happened, the provisions of the No. 3 Ordinance and the Notice declared to be unconstitutional in **Ng Ka Ling** (other than s.1(2), the retrospective provision) were validated with effect commencing on 1 July 1997. Likewise, the time of birth limitation in the No. 2 Ordinance held invalid in **Chan Kam Nga** was validated with similar effect. The Director of Immigration's submission on this point must be accepted. After the Interpretation issued, the Director of Immigration had no power to issue a certificate of entitlement to the applicants who lacked a one-way exit permit.

117. Following the Interpretation, on 16 July 1999, the Legislative Council passed a resolution under s.59A of the Immigration Ordinance to amend Schedule 1. The amendment repealed para. 2(c) and substituted the following :

> "(c) A person of Chinese nationality born outside Hong Kong before or after the establishment of the Hong Kong Special Administrative Region to a parent who, at the time of birth of that person, was a Chinese citizen falling within category (a) or (b)."

The new paragraph contains the time of birth limitation that was contained in the invalidated paragraph. On the same day, the Director of Immigration gazetted a new notice under s. 2AB(2)(a) to replace the former notice. It is in terms similar to the former notice.

118. These changes, made in the light of the Interpretation, reinforced the certificate of entitlement provisions in the Ordinance. Under these provisions, the Director of Immigration is precluded from verifying the applicants' entitlement to right of abode or treating them in the same way as the litigants in **Ng Ka Ling** and **Chan Kam Nga** were to be treated.

119. The Director of Immigration argues that the applicants cannot have a legitimate expectation to be treated in the same way as the litigants in those cases are to be treated because the Interpretation and the validation of the certificate of entitlement scheme date back respectively to 1 July and 10 July 1997. So, according to the Director of Immigration's argument, the applicants' expectation does not conform to the law as it now stands or is contrary to that law. An alternative way of expressing what in essence is the same argument is that there cannot be a legitimate expectation that the law will not be changed. (see **R v. Secretary of State for Social Security, Ex parte McEntire**, Popplewell J, unreported, judgment delivered on 23 March 1992).

120. As matters stood before the Interpretation issued on 26 June 1999, and subject to the reservation affecting the general representations as to whether it may be necessary to show detrimental reliance, the applicants had an expectation, amounting to a legitimate expectation, to which legal effect could have been given by the Director of Immigration prescribing a notice under s.2AB(2)(a) of the Immigration Ordinance. That expectation was that the applicants would be treated in accordance with the principles expressed in the judgments of this Court in **Ng Ka Ling** and **Chan Kam Nga**. But we are concerned with the law as it stood after 26 June 1999, at the time when the Director of Immigration exercised his powers in the way now complained of.

121. Before examining the law post-26 June 1999, it is necessary to identify with greater precision what the applicants' expectation entails. As Lord Scarman asked significantly in **In re Findlay** [1985] 1 AC 318 at 338, "What was their *legitimate* expectation?" (emphasis in original). The applicants claim, in accordance with the principles stated in the two decisions of this Court,

> (1) that they will not be required to have a one-way exit permit issued by the Mainland authorities before being able to establish a right of abode under art. 24(2)(3) of the Basic Law - *Ng Ka Ling*; and
>
> (2) that they will be regarded as qualifying under art. 24(2)(3) of the Basic Law even though at the time of their birth, neither parent had yet acquired permanent resident status in the HKSAR - *Chan Kam Nga*.

This claim, in our view, amounts to a correct statement of what the applicants' expectations entailed.

122. Once the applicants' expectation is expressed in these terms, as indeed it must be, if it is to accord with the principles stated in the two decisions, it is apparent that the expectation does not conform to the law as it stands and has stood since the Interpretation. Effect cannot legally be given to the expectation in the terms in which it is expressed in the preceding paragraph.

The scope of the Director of Immigration's statutory discretion under ss. 11, 13 and 19(1) of the Immigration Ordinance

123. This conclusion does not dispose of the applicants' case. The applicants further submit that, although the Director of Immigration cannot give full effect to their legitimate expectation as claimed, he can go some distance towards satisfying their expectation to the extent of allowing them to enter and reside in Hong Kong. He can do this, so the argument runs, in the exercise of the discretions conferred by various provisions in the Immigration Ordinance - s.11 (permission to land), s.13 (permission to remain) and s.19(1) (power to make or refuse to make a removal order). According to the argument, these discretions can be properly exercised in favour of the applicants to allow them to enter and reside in Hong Kong and so, their expectation, to the limited extent that it entails entering and residing in Hong Kong, can be satisfied and is not contrary to law.

124. The applicants also place some reliance on the Registration of Persons Ordinance, Cap. 177 and the regulations made thereunder. The argument is that under that Ordinance and the regulations made thereunder a permanent identity card could be issued to an applicant who is allowed to enter and reside in Hong Kong without restrictions, thereby establishing the applicant's permanent resident status under s.2AA of the Immigration Ordinance. This argument depends upon the favourable exercise of discretions conferred by the Immigration Ordinance, particularly by ss. 11, 13 and 19(1).

125. Section 11 authorizes the grant of permission to enter Hong Kong, subject to a limit of stay and conditions of stay as may be appropriate. Sections 11(5) and (5A) confer a power to cancel and vary conditions of stay and to vary limits of stay, the latter being a power which can be exercised after a limit of stay has expired (**Sae-Ang Paisarn v. Director of Immigration** [1989] 1 HKLR 205). Section 13 enables the Director of Immigration to authorize a person who has entered Hong Kong illegally to remain in Hong Kong, subject to such conditions of stay as he thinks fit. Section 19(1)(b) provides that a removal order "may be made [by the Director of Immigration] against a person requiring him to leave Hong Kong" in a variety of circumstances. One such circumstance is, "if it appears to the Director of Immigration" that the person :

> "(ii) has ..... [entered] Hong Kong unlawfully or is contravening or has contravened a condition of stay in respect of him."

126. The applicants submit that the three provisions confer discretions which are wide enough to

take into account the circumstances which gave rise to the applicants' original expectation to be treated as parties to the **Ng Ka Ling** and **Chan Kam Nga** litigation and to give effect to such incidents of that expectation to the extent that he may lawfully do so. On the other hand, Mr Ma SC for the Director of Immigration submits that, whatever the scope of the particular discretion may be, the discretion does not extend to authorizing a person, who has come from the Mainland to Hong Kong to claim the right of abode, to remain here when he is not by law entitled to the right of abode. To put the argument another way, there is no discretion "to disapply Part 1B". Mr Ma SC also contends that, whatever the scope of the particular discretion may be, the Director of Immigration has a discretion to decide what he shall have regard to and is under no enforceable duty to take account of the circumstances from which the applicants' expectation arose.

127. No one has suggested that "may" in s. 19(1) is to be read otherwise than in a permissive sense. But the Director of Immigration's argument is that the width of this discretion, like the discretions under ss.11 and 13, is circumscribed by the provisions of Part 1B relating to permanent residents under para. 2(c) of Schedule 1. According to the argument, Part 1B constitutes a comprehensive code governing the entitlement to enter and reside in Hong Kong of those persons who claim to be permanent residents under para. 2(c) of Schedule 1. So, it is said, the discretions, including the power to order removal, must be exercised in order to give effect to the Part 1B legislative scheme.

128. This argument attributes too much to the Part 1B legislative scheme. The scheme governs the entitlement of persons claiming permanent residence under para. 2(c) of Schedule 1 and, in consequence, the right of abode under Part 1A. But the scheme in Part 1B does not purport to govern, or govern exclusively, the rights of such persons to stay in Hong Kong otherwise than as a permanent resident. Those rights depend upon the exercise of the Director of Immigration's statutory powers. Thus, it is conceded on behalf of the Director of Immigration that he can lawfully refuse on humanitarian grounds to order the removal of an unsuccessful claimant for permanent residence under para. 2(c) of Schedule 1 (see **Lau Kong Yung; R v. The Director of Immigration, Ex parte Chan Heung-mui & others** (1993) 3 HKPLR 533 at 543 et seq). In **Lau Kong Yung**, this Court held that, under s. 19(1), the Director of Immigration had a discretion not to order removal even if the conditions under s. 19(1)(b)(ii) were satisfied, though he was not bound to take into account humanitarian grounds.

129. The Director of Immigration argues that a similar principle applies to the consideration of any other factors which might operate in favour of exercising his discretions in favour of the applicants. In other words, all such factors, like humanitarian grounds, are matters to which he can have regard, if he so chooses, but he is not bound to take them into account. This argument cannot be sustained. This is because if the circumstances are such as to raise a legitimate expectation, the common law itself imposes a duty on the decision-maker, grounded in the principle of good administration and the duty to act fairly, to take that legitimate expectation into account, so long as, and to the extent that, taking it into account is not inconsistent with the statutory provisions and does not undermine the statutory purpose (*Bibi*, para. 51).

130. Although the discretions are expressed in unqualified terms, their scope must be ascertained by reference to the Basic Law as interpreted by the Standing Committee, the purpose and policy of the Ordinance and the primary character of s.19(1) as a provision which enables effect to be given to the legislative scheme for which the Ordinance provides. Viewing the discretions in ss. 11, 13 and 19(1) in that light, they permit the Director of Immigration in exceptional cases to allow individuals to remain in Hong Kong even though they are here unlawfully and are unable to establish a right of abode in accordance with the Immigration Ordinance under art. 24 of the Basic Law. But it is clear that the three discretions cannot be exercised in a way that would undermine the general constitutional and statutory scheme which defines and restricts entitlement to the right of abode and would be inconsistent with the primary character of s.19(1).

131. The approach we take to the scope of the discretions accords with that taken by the English

Court of Appeal in *Begbie*. There, after being returned to power in a general election, the Labour government caused the Education (Schools) Act 1997 to be enacted, abolishing a system whereby public funds had been used to finance the education of individual pupils in private schools. This change was in line with the Labour party's election platform and the Labour government's stated education policy. However, statements had also been made by the government to parents of pupils benefiting from the scheme that steps would be taken to avoid disrupting the pupils' education. The Act reflected this by providing that such funding could continue to enable a pupil to complete the current phase of education but would not be made available, for instance, for a child progressing from primary to secondary school. This limitation was, however, subject to a discretionary power given to the Secretary to continue funding beyond the current educational phase in individual cases.

132. The applicants in that case sought judicial review on the basis that statements of policy had given rise to a legitimate expectation on their part that funding would be continued beyond their current phase of education, a course which they contended did not fall foul of the Act since it could be effected by the Secretary exercising his discretionary power. The application was rejected. The court reiterated the principle that any legitimate expectation has to give way to contrary statutory provisions and held that a discretionary power to make exceptions cannot be operated in such a way as to displace the primary purpose and effect of the statute.

133. Peter Gibson LJ said

> "..... the starting point must be the Act of 1997. It is common ground that any expectation must yield to the terms of the statute under which the Secretary of State is required to act. Section 2(1) limits the ability of a school to provide assisted places to the circumstances provided for in subsection (2). That subsection requires a child with an assisted place who is receiving primary education to cease to hold that place at the end of the year in which the child completes his or her primary education unless discretion is exercised by the Secretary of State under paragraph (b). That paragraph is plainly intended to cater for the exceptional case where, having regard to particular circumstances of a particular child, it is reasonable in the eyes of the Secretary of State to make an exception for the child. As Mr. Havers submitted, if the Teed letter promise is implemented, virtually all children receiving primary education at "all through" schools would have to be allowed to keep their assisted places till the end of their secondary education. It is not in dispute that the Secretary of State is obliged to act in an even-handed manner and that if Heather were allowed to keep her assisted place, so must all others in the like circumstances. To treat the Secretary of State as bound to implement the promise in the Teed letter for all in Heather's position would plainly be outside the contemplation of the section, and contrary to what must have been intended by section 2(2)(b)." (at 1125)

Laws LJ stated

> "I agree that this appeal should be dismissed on the short ground that to give effect to Mr. Beloff's argument would entail our requiring the Secretary of State to act inconsistently with section 2 of the Education (Schools) Act 1997." (at 1129)

Sedley LJ said

> "..... the discretion must not be exercised in a way which undermines the statutory purpose. In the present case this means that it cannot be used simply to provide assisted places for effectively all those pupils whose assisted places are not saved by the statute itself. To do so would plainly be to defy Parliament's intent. I agree with Peter Gibson and Laws L.JJ. that this principle is dispositive of the present case." (at 1132)

The application of the Director of Immigration's statutory powers to the facts of this case

134. Once it is concluded that the relevant statutory powers cannot be exercised in such a way as to undermine the statutory scheme as a whole, it must follow that the Director of Immigration cannot validly allow all the representees of the four relevant general representations (see para. 83), whose number may be of the order of more than 600,000, to enter and reside in Hong Kong. To do so would be to exercise the powers in ss. 11, 13 and 19(1), ss. 13 and 19(1) being exceptional powers, to undermine the entire legislative scheme. The Director of Immigration, who is obliged to exercise his powers fairly, must treat the general representees, who are right of abode claimants, in an even-handed way. There is no basis upon which he can properly distinguish between the members of this very large innominate class so as to favour some but not others. The original expectation claimed, to which legal effect cannot now be given and which is the material consideration grounding the exercise of the discretion one way or the other, is common to all members of this general class.

135. The consequence is that the Director of Immigration cannot lawfully exercise his discretionary powers in favour of this general class of claimants.

136. In any event, it might very well be that, even if, contrary to this conclusion, the Director of Immigration could lawfully exercise his discretionary powers in favour of this class of claimants, he would be entitled to decide that their expectation, arising as it does only from general statements made by or on behalf of the government, is overridden by the overwhelming force of the immigration policy which underlies the legislation validated by the Interpretation.

137. The applicants who assert a legitimate expectation on the basis of specific representations made to them as individuals in the Legal Aid pro forma replies and the letter received by RA13 from the Secretary for Security are in a different position. They constitute a discrete and ascertainable class defined by their being in receipt of written communications from government authorities containing the representations in question. The exercise in their favour of the relevant discretionary powers would not undermine the statutory policy as a whole. Although a significant number of persons may be capable of benefiting from an exercise of the discretionary powers on this basis, the numbers benefiting would still represent only a small fraction of the relevant claimants or potential claimants and would constitute a specific group of individuals susceptible to exceptional discretionary treatment.

138. Is it permissible to give applicants who are members of this specific representation class exceptional treatment? This question should, in our view, be answered in the affirmative. Although it is no longer possible to give effect to the original legitimate expectation of these applicants, that expectation included, as an incident of the claimed right of abode, entering and residing in Hong Kong. To that extent, it lies within the power of the Director of Immigration to give effect to these applicants' legitimate expectation by a favourable exercise of discretion under ss. 11, 13 and 19(1) and, accordingly, to that extent, the expectation is not contrary to law. It follows that the legitimate expectation, limited in the manner just described, of the members of the specific representation class is one which the Director of Immigration was and is bound to take into account in exercising his discretions under ss. 11, 13 and 19(1). The disappointment of the original legitimate expectation of members of this class has given rise to a very substantial degree of unfairness which the Director can partly alleviate by a favourable exercise of his powers.

139. Support for this view is provided by **Coughlan**. In that case, the promise was to provide accommodation for life at Mardon House. One of the complaints was that after government policy changed, the Minister had failed to offer alternative accommodation which could be said to be reasonably equivalent to Mardon House. (See p.657 C - D.) The Court of Appeal held that, absent such an offer, there was unfairness amounting to an abuse of power by the health authority. The failure to offer alternative accommodation went to the fairness of the Minister's decision.

The validity of the removal orders and the decisions not to quash removal orders

140. In accordance with what has been said earlier, an administrative decision made without regard to a breach of promise or representation which has given rise to a legitimate expectation that it will be honoured, and made in breach of that promise or representation, constitutes an abuse of power and is vitiated (*Bibi*, para. 39), unless it is established that, even if the expectation were taken into account, it would not have materially affected the decision. The Director of Immigration contends that this is such a case because the policy considerations which support removal are of overwhelming strength.

141. It is for the Director of Immigration to establish that the outcome was inevitable in the sense described above. It is only in an exceptional case that the Court will take this course because, in principle, the making of the decision should be left with the officers in whom it is reposed by statute. To do so conforms with the doctrine of the separation of powers which is an integral element in the common law system which prevails in Hong Kong. That would be a sufficient reason in this case for not embarking upon the exceptional course suggested by the Director of Immigration. However, added to that is our conclusion that departure from the applicants' expectation based on the specific representations (contained in the Legal Aid pro forma replies and the letter received by RA13 from the Secretary for Security) involved a very substantial degree of unfairness. The former, as we have said, expressly encouraged the recipients to refrain from taking the very course of action which, if taken, would have brought them within the protection of "judgments previously rendered". The latter stated that the Immigration Department would follow the final judgment of the Courts in dealing with applications for certificate of entitlement. Allowing the specific representees to reside in Hong Kong would not appear to have a significant impact on policy and would substantially alleviate the unfairness occasioned to them. In the circumstances, we would not be justified in holding that the Director of Immigration's decision would necessarily have remained the same, if the applicants' expectation based on the specific representations had been taken into account.

142. The orders for removal against the applicants in the specific representation class must be quashed, so that the Director of Immigration is required to exercise his discretion afresh. In so doing, he is obliged to consider whether, in the light of the legitimate expectation of persons in this class, he ought to exercise his discretionary powers in their favour so as to allow them to reside in Hong Kong. To this end, the removal orders made against applicants in the "specific representation" class must be quashed, with a declaration that the Director of Immigration ought to reconsider their cases in the light of this judgment and of his discretionary powers under ss. 11, 13 and 19(1) of the Immigration Ordinance, giving substantial weight to the need to mitigate the unfairness of resiling from representations which have given rise to the legitimate expectation in question.

143. It is to be noted that, if the Director of Immigration, on re-consideration of such an applicant's case, decides to exercise his discretionary powers in the applicant's favour and to allow him to reside in Hong Kong, this would represent giving only partial relief from the unfairness of not giving effect to the original legitimate expectation. Giving permission to reside here is obviously not the same as processing the applicant's right of abode application as if he were a party to the Ng and Chan cases. That course is not open to the Director of Immigration. It would represent instead the Director of Immigration mitigating the unfairness of disappointing the legitimate expectation to the extent permissible by the law, without undermining the basic statutory scheme.

144. It may be that a right of abode claimant who is allowed to stay in Hong Kong on this basis may eventually be able to claim a right of abode on a separate footing, e.g., under art. 24(2)(2) of the Basic Law, after building up seven years continuous ordinary residence in HKSAR. But that would be a right of abode acquired by a different legal process and it is not a matter which forms any part of our consideration of this case.

Legitimate expectation in individual cases

145. In the light of what we have said, we turn now to the individual cases before the court.

146. RA8 - Mr Lau Pong - He claims he was the recipient of a reply from the Secretary for Security dated 10 July 1998 in response to a petition from a family concern group. As a member of the general representation class, he is not entitled to relief.

147. *RA11 - Mr Chan Kei Yui* - He is a representative of more than 1,000 applicants who were issued the Legal Aid pro forma replies informing them that there was no need to start any action in view of the pending court cases. These replies constituted the specific representation which gave rise to a legitimate expectation that these applicants would be treated as if they were parties to the **Ng Ka Ling** and **Chan Kam Nga** litigation. Applicants in this class are entitled to have the orders for removal against them quashed and the Director of Immigration ought to reconsider their cases in the light of this judgment and of his discretionary powers under ss. 11, 13 and 19(1) of the Immigration Ordinance.

148. *RA12 - Ms Wong Yuk Heung* - She is a representative of those applicants who rely on a legitimate expectation arising from a specific representation contained in standard letters from the Immigration Department (see para. 66) telling them that no decision could be made since there were cases pending appeal. These letters did not give rise to any legitimate expectation and she is not entitled to relief.

149. *RA13 - Mr Yuan Zhi Wei* - He is a representative of those applicants who claim to have a legitimate expectation arising out of letters which were in terms similar to the standard letter from the Immigration Department (see para. 66) saying that no decision was made since there was an appeal pending. These letters did not give rise to any legitimate expectation. As a recipient of such a letter, he is not entitled to relief. However, he was also the recipient of a letter from the Secretary for Security dated 24 April 1998 in which the Secretary said that the Immigration Department would follow the court's judgment in dealing with applications for certificate of entitlement. This was a specific representation which gave rise to a legitimate expectation entitling him to the same relief as RA11.

150. *RA15 - Ms Yip Yam Wa* - She is a representative of those applicants who rely on the general representations made by government officials which were said to have given rise to a legitimate expectation. As a member of the general representation class, she is not entitled to relief.

151. *RA3 in FACV 3/2001- Ms Chau Yin Ping* - She is a representative of those applicants who rely on the general representations made by government officials of which she said she was fully informed while she was in the Mainland. As a member of the general representation class, she is not entitled to relief.

"ABUSE OF PROCESS" ISSUE

152. In their written submissions, the applicants relied on the ground of an abuse of power. In oral argument, Mr Robertson QC for the applicants developed this ground into an abuse of process argument. It was an argument which was not taken in the courts below. The basis for this new submission is by no means clear. As we understand it, the argument runs as follows.

153. The Director of Immigration's refusal to abide by the test case procedure, a procedure which was approved and adopted by Keith J at first instance and accepted by the Court of Appeal and this Court in **Ng Ka Ling** and **Chan Kam Nga**, amounts to an abuse of process. The test case procedure involved the selection of cases which were "representative cases" and the adjournment of other cases which would await the outcome of the representative cases.

154. The applicants submit that the test case procedure would not have been adopted by the court but

for the Director of Immigration's representation that he would abide by the outcome in the representative cases selected for trial. The applicants then submit that the Director of Immigration's decision to order the removal of persons who were to be treated in the same way as the test case litigants is incompatible with the test case procedure adopted by Keith J and his adjournment of the other cases. This, so the argument runs, amounts to an abuse of process, which should be remedied by holding the Director of Immigration to his representation or by restraining the Director of Immigration from executing the removal orders against the applicants. The remedy of holding the Director of Immigration to his representation encounters the difficulties already considered in relation to the legitimate expectation issue.

155. The typical case of abuse of process is one in which proceedings, civil or criminal, are commenced or undertaken for an improper purpose, such as the obtaining of a collateral advantage beyond the legitimate purpose and scope of the proceedings (**Hunter v. Chief Constable of the West Midlands Police & others** [1982] AC 529 where a civil action which was commenced to initiate a collateral attack on a decision of a criminal court of competent jurisdiction was struck out).

156. The usual remedy is to stay the proceeding on the ground that it constitutes an abuse of the process of the court. Abuse of process may, however, take various forms and may attract relief other than a stay. In **R v. Horseferry Road Magistrates' Court, Ex parte Bennett** [1994] 1 AC 42, Lord Griffiths referred (at 61), with evident approval, to **Chu Piu-wing v. Attorney-General** [1984] HKLR 411 where McMullin VP said at 417-418:

> "there is a clear public interest to be observed in holding officials of the state to promises made by them in full understanding of what is entailed by the bargain."

In that case, the Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena on the ground that the witness had been assured by the Independent Commission against Corruption that he would not be required to give evidence.

157. Again, in **R v. Croydon Justices, Ex parte Dean** [1993] QB 769, a conviction was quashed on the ground that the accused had been assured by the police that he would not be prosecuted for an offence and it was an abuse of process to prosecute him in breach of that promise.

158. And, in **R v. Bloomfield** [1997] 1 Cr App R 135, a conviction was quashed on the ground of abuse of process, where the prosecution stated at the trial that no evidence was being offered. The trial was then adjourned for the benefit of the prosecution "in order that they would not be embarrassed" (see p. 143). The prosecution subsequently changed its mind. A plea of guilty was entered after an application for a stay on the ground of abuse of process was refused by the trial judge. The Court of Appeal held that it would bring the administration of justice into disrepute to allow the Crown to revoke its original decision without any reason being given as to what was wrong with the decision having been made *coram judice* in the presence of the judge.

159. These three cases are illustrations of the statement made by Lord Woolf in **Attorney-General of Trinidad and Tobago & another v. Phillip & others** [1995] 1 AC 396 at 417:

> "The common law has now developed a formidable safeguard to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so."

As the cases demonstrate, in such circumstances, the court will not only stay a prosecution, it will also quash a conviction where the prosecution has proceeded to conviction. In that respect, the cases indicate that the court will not only grant a stay to prevent an abuse of process but will also deprive a party of the benefit of a judgment if the obtaining of the judgment has involved an abuse of process. Here, however, there is no suggestion that the judgments in *Ng Ka Ling* and ***Chan Kam Nga*** involved or were the product of any abuse of process. The applicants rely on those judgments.

160. The cases offer no support at all for the use of the concept of abuse of process which the applicants seek to make here. The acts said to give rise to the abuse of process were the government's decisions, all taken *after* the conclusion of the litigation in this Court. One was to seek the Interpretation; another was to depart from the representations which had resulted in the adoption of the test case procedure; and the third was the making of the removal orders.

161. The making of a removal order is not part of the curial process; it is an order made by the Director of Immigration in the exercise of statutory power. The fact that it is subject to review by the court under its supervisory power does not transform the making of the order into an element in the curial process. The making and execution of a removal order form part of the administrative process and have nothing to do with the process of the court.

162. Accordingly, it is not possible in this case to apply, in the context of abuse of process, the public interest principle, enunciated by McMullin VP, in holding officials to promises which they have made.

163. For these reasons, there is no substance in this ground.

"PERIODS 1 AND 2" ISSUE

164. This issue only applies to applicants who arrived in Hong Kong before 1 July 1997 and those who came here between 1 and 10 July 1997. The significance of these periods is that prior to 1 July 1997, the Basic Law had not taken effect and the No. 3 Ordinance was enacted on 10 July 1997, although it purported to take effect as from 1 July 1997. The applicants' submission is that it is art. 22(4) as interpreted by the Interpretation which requires Mainland approval before entering Hong Kong and hence, those persons who entered before 1 July 1997 were not subject to art. 22(4) and the Interpretation in respect of this article. The applicants derive support from the majority decision on this point of the Court of Appeal in **Cheung Lai Wah** [1998] 1 HKC 617. As regards those who entered Hong Kong between 1 and 10 July 1997, the applicants rely on the ruling of this Court in **Ng Ka Ling** that the No. 3 Ordinance had no retrospective effect. This ruling was not affected by the Interpretation. See **Lau Kong Yung**.

165. The answer to the applicants' argument depends on the effect of art. 22(4) of the Basic Law, having regard to the Interpretation. This article provides :

> "For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.."

Period 1

166. This article, being part of the Basic Law, took effect only on 1 July 1997. It requires Mainland residents to obtain approval from the Mainland authorities for entry into the Hong Kong Special Administrative Region, *not Hong Kong*. Because this requirement can apply only as from 1 July 1997, art. 22(4) is therefore prospective in effect. According to the Interpretation, it affects all people from other parts of China who wish to enter the HKSAR for whatever purpose, including the purpose of settlement. The requirement is of general application and is not linked only to art. 24(2)(3). Consequently, the restriction is not confined to those persons who wish to enter the HKSAR to exercise the right of abode under art. 24(2)(3).

167. Persons who had entered Hong Kong prior to 1 July 1997, whether illegally or otherwise and continued to stay beyond 1 July 1997 cannot be said to be entering the *HKSAR* when they entered before that date. There was then no HKSAR and art. 22(4) of the Basic Law had not then taken

effect.

168. In **Lau Kong Yung**, the Chief Justice said at page 327F that once art. 24(2)(3) was to be read as qualified by art. 22(4), the right of abode could not be enjoyed unless the requirement of Mainland approval in art. 22(4) had been obtained. Ching PJ also took the view that "the link between art. 22 (4) and art. 24(2)(3) meant that persons from the Mainland seeking to settle in Hong Kong need both a one-way exit permit and a certificate of entitlement which are to be applied for in the Mainland". See page 341F. But Keith JA was correct when he said that the Court in **Lau Kong Yung** did not specifically address the question of the effect of the relationship between art. 22(4) and art. 24(2)(3) on persons who had arrived in Hong Kong before 1 July 1997.

169. In our view, the language of art. 22(4) is clear and does not cover those persons who had arrived before the handover. On 1 July 1997 when art. 24(2)(3) took effect, Period 1 applicants were already in Hong Kong. If they could then establish their permanent resident status under that article, they should, in the absence of any other provision in the Basic Law or any valid domestic legislation which adversely affects their position, be entitled to have their status verified and to exercise their right of abode here without the need to have a one-way exit permit. Their position was not affected by any provision in the Basic Law. As the No. 3 Ordinance did not have retrospective effect, no Hong Kong legislation affected them.

170. While this argument avails Group A applicants, Group B applicants are still affected by the Interpretation in respect of art. 24(2)(3), as they are caught by the time of birth limitation. In other words, although art. 22(4) did not apply to them because they had entered Hong Kong before 1 July 1997, they do not qualify under art. 24(2)(3) as interpreted by the Interpretation. Their claim would still fail.

Period 2

171. The position of those persons who arrived between 1 and 10 July 1997 is different. They entered the HKSAR after 1 July 1997. Because they were people from other parts of China, they were affected by art. 22(4) when they sought to enter the HKSAR. Hence they required Mainland approval to do so. True it is that they could rely on art. 24(2)(3) upon entry but they were also subject to the restriction in art. 22(4) which took effect at the same time as art. 24(2)(3). As Mortimer V-P in **Cheung Lai Wah** said at page 667:

> "The position of these applicants as at midnight plus on 1 July 1997 was that they had become permanent residents by descent under art. 24(3). But art. 22(4) had also come into force. A permanent resident wishing to exercise his right of abode and settle in Hong Kong could only do so having applied for - and by necessary implication obtained - approval evidenced by a one-way permit."

172. Persons who entered the HKSAR between 1 and 10 July 1997 without Mainland approval cannot take the benefit of art. 24(2)(3). In other words, they cannot take the benefit of art. 24(2)(3) without at the same time accepting the restriction in art. 22(4).

173. For these reasons, both Group A and Group B applicants who arrived during Period 2 cannot succeed under this ground.

Periods 1 & 2 issue : determining the individual cases

174. It is necessary, in the light of what we have said, to deal with the individual cases before the Court.

175. *RA3 - Ms Lo Po Lai* - She is a Group A applicant who arrived in Period 1. She represents

another 32 applicants in the same position. They succeed on this ground.

176. *RA4 - Ms Chu Chun Man* - She is a Group B applicant who arrived in Period 1. She represents another 413 applicants in the same position. As they are affected by the time of birth limitation, they fail on this ground.

177. *RA5 - Mr Tam Siu Ming* - He is a Group A applicant who arrived in Period 2. He represents another applicant who arrived in Period 2. They fail on this ground.

178. *RA5 in FACV 3/2001* - Mr Lam Chi Lok - He is a Group B applicant. Although he first arrived in Period 1, he returned to the Mainland and came back to Hong Kong in Period 5. Whether he can be regarded as a Period 1 or Period 5 arrival (which is disputed by the Director of Immigration), he is affected by the time of birth limitation. He still fails on this ground.

"THE CONCESSION" ISSUE

Factual basis for the Concession

179. In order to understand the nature and scope of the Concession, it is necessary to examine the policy decision in question, how it was arrived at and the rationale behind it. The affidavit of the Secretary for Security states the circumstances in which the policy decision was made. She was not cross-examined on her affidavit.

180. On 26 June 1999, the Executive Council met and discussed how the Interpretation should, as a matter of government policy, be applied. The Council was concerned with the question as to who would be unaffected by the Interpretation. The last paragraph of the Interpretation referred to "parties concerned in the relevant legal proceedings". From the Chief Executive's subsequent announcement, it would seem that the Council had in mind the principle expressed in art. 158(3) that judgments previously rendered shall not be affected.

181. It was clearly understood that the named applicants in the **Ng Ka Ling** and **Chan Kam Nga** cases would not be affected because the judgments were given in their favour. They were the direct beneficiaries of these decisions. Apart from them, there were persons to whom the Director of Immigration had, during the course of the litigation, given an undertaking not to remove them from Hong Kong pending the outcome of those proceedings. These persons consisted of:

> (a) parties to judicial review proceedings raising the issues raised in the Cheung Lai Wah (later to be known as *Ng Ka Ling*) cases and awaiting the outcome of the representative cases;
>
> (b) persons covered by the agreement between the Department of Justice acting on behalf of the Director of Immigration and the solicitors acting for these persons and between the Director of Immigration and the Legal Aid Department in respect of whom the Director of Immigration had given an undertaking not to remove them from Hong Kong pending the outcome of the representative cases; and
>
> (c) persons notified to the Director of Immigration by the solicitors in the *Chan Kam Nga* case and agreed to be covered by a similar undertaking given by the Director of Immigration.

182. There is no difficulty with persons in category (a) since they had already commenced proceedings against the Director of Immigration and their cases could have proceeded to conclusion as the **Cheung Lai Wah** cases. The persons in categories (b) and (c) were considered by the government as "indirect" parties to the litigation in the sense that, if they had not been given the

undertaking by the Director of Immigration, they would have either joined in the pending proceedings or commenced fresh proceedings to assert their right of abode and would have ended up in the same position as the named parties in the representative cases.

183. The government also considered that those persons who had lodged claims for right of abode with the Director of Immigration on or before 29 January 1999 should benefit from the Court of Final Appeal judgments. According to the Secretary for Security, when the government was considering whether other persons should be treated in accordance with the two judgments, it took the view that the fairest and most rational way of dealing with that question was to have regard to (a) the person's physical presence in Hong Kong and (b) whether the person had sought to establish his status by making a claim to the Director of Immigration for right of abode of which the Director of Immigration had a record. The rationale behind accepting persons who had lodged claims for right of abode with the Director of Immigration on or before 29 January 1999 was that those who arrived between 1 July and 10 July 1997 should be included because the Court of Final Appeal had held that the No. 3 Ordinance did not have retrospective effect. And those who arrived between 11 July 1997 and 29 January 1999 should be included because, if they had brought their own proceedings, they would have been parties before the Court of Final Appeal either in their own right or covered by undertakings.

184. Accordingly, the Chief Executive in Council made a policy decision which was in the following terms:

> (a) persons who were in Hong Kong between 1 July 1997 and 29 January 1999 and had lodged claims for the right of abode with the Director of Immigration during that period should be verified in accordance with the judgments of the Court of Final Appeal on 29 January 1999 and, if qualified, should be given permanent resident status; and
>
> (b) persons who were in Hong Kong and had lodged right of abode claims with the Director of Immigration between 30 January and 26 June 1999 should not benefit from the principle that judgments previously rendered shall not be affected by the Interpretation.

185. In the afternoon of 26 June 1999, the Chief Executive held a press conference at which he made an announcement of the Interpretation issued by the NPCSC and the decision of the Executive Council as follows:

> "Secondly, to comply with the principle that judgments previously rendered by the Court of Final Appeal shall not be affected by an interpretation of the National People's Congress Standing Committee, we will allow persons who arrived in Hong Kong between July 1, 1997 and January 29, 1999, and had claimed the right of abode, to have their status as permanent residents verified in accordance with the CFA decision. It is estimated that there are about 3,700 people in this category.
>
> Thirdly, for those who arrived after January 29, 1999, or I could put it in another way, thirdly, for any other persons, they will only be able to apply for the right of abode if they satisfy the terms of the interpretation given by the Standing Committee of the National People's Congress."

186. On the same day and at more or less the same time, the government also issued a press release concerning the decision of the Executive Council. The press release, which fleshes out the policy decision, is in these terms:

> "Some 3,700 persons are set to benefit from the principle that judgements rendered previously shall not be affected by the interpretation by the National People's Congress

Standing Committee (NPCSC) of the Basic Law provisions in respect of the right of abode (ROA) issue.

'The persons to benefit are those who were in Hong Kong between July 1, 1997 and January 29, 1999 and laid ROA claims with the Director of Immigration whilst in Hong Kong during this period,' a Government spokesman explained today (Saturday).

Two groups of persons fall under this category.

'The first group are those who were present in Hong Kong and claimed ROA in the period between July 1 and July 10, 1997,' the spokesman said.

'The Court of Final Appeal (CFA) has ruled that they are not subject to the Certificate of Entitlement (C of E) Scheme because the Immigration (Amendment) (No. 3) Ordinance enacted on July 11, 1997 does not have retrospective effect.

'Provided they satisfy the criteria for ROA under the CFA judgement, they will have and will retain their ROA status despite the interpretation,' the spokesman said.

Another group of beneficiaries are those who were in Hong Kong and approached the Immigration Department to claim ROA between July 11, 1997 and January 29, 1999.

'They include the 86 litigants themselves in respect of the two test cases on which the CFA ruled on January 29, 1999 and those who were parties concerned in the relevant legal proceedings.'

'In other words, Mainland persons who were in Hong Kong and who submitted claims to the Director of Immigration for the ROA between July 1, 1997 and January 29, 1999 may be regarded as being parties concerned. The total number of persons involved are about 3,700.'

The ROA claims by some of these persons have already been verified or being verified at the final stage. Over 900 persons have already obtained or may shortly obtain the ROA.

'The applications from the remaining ROA claimants (over 2,700) will be processed in accordance with the CFA judgement,' the spokesman said.

'About 900 of them are currently in Hong Kong. They will not need to return to the Mainland before their applications are processed and results are made known.'

'For the other some 1,800 claimants who have returned to the Mainland, arrangements will be sought to facilitate the processing of their applications in due course,' he said.

The spokesman pointed out that persons who arrived in Hong Kong and claimed ROA between January 30 and June 26, 1999 would have their claims processed subject to the NPCSC interpretation."

187. The press release reflected to some extent the thinking of the Executive Council behind the policy decision. However, neither the policy decision nor the Chief Executive's announcement nor the press release made any reference to a requirement that the Director of Immigration should have a record of a claim.

188. A point was taken as to the accuracy of the translations of the Chief Executive's announcement

and the press release made on the same day. We shall deal with this point when we discuss the question as to the proper authority to which a claim for right of abode could be made in order to fall within the policy decision.

Nature of policy decision

189. Before we consider the meaning of the policy decision, a number of points must be noted. First, the object of this decision was to enable a limited class of persons who had, or would have, taken the government to court, in pursuit of their claim to right of abode, to benefit from the two judgments. The cut off date, i.e. 29 January 1999, was chosen because it was the date on which the final judgments in those proceedings were handed down. Secondly, the policy decision could be perceived as having the effect of addressing, to some extent, the apparent sense of grievance and the frustration of the legitimate expectations of those persons who, as a result of various representations, had been told to await the decisions of the court without commencing proceedings, or joining in existing proceedings. Thirdly, the Chief Executive's announcement must be considered, together with the contemporaneous press release, as a public statement of the policy decision made by the Chief Executive in Council. It is a policy decision which gave rise to an expectation, not a right, that it would be implemented. The Chief Executive's announcement is not to be viewed in isolation, divorced from the contemporaneous press release and the policy decision on which they were based. Fourthly, the detailed account contained in the press release as to the number of persons estimated to be beneficiaries of the policy decision and their breakdown indicated the government's view as to how the policy decision would apply to the relevant categories of right of abode claimants when it formulated the decision.

The policy decision

190. The policy decision must be understood in its proper context which included the history of the litigation, the events leading to the Interpretation, the object of and the rationale behind the decision itself and the legal position of a Mainland resident who wished to claim permanent resident status in Hong Kong. First, since the enactment of the No. 3 Ordinance, it has always been the law, as upheld by this Court in **Ng Ka Ling**, that a Mainland resident can only apply for a certificate of entitlement in the Mainland. He cannot do so while he is in Hong Kong. Secondly, a Mainland resident who is in Hong Kong as an illegal immigrant or overstayer is liable to be removed unless the Director of Immigration has decided not to remove him. If, on a claim to right of abode being made, the Director of Immigration does not agree to withhold removal, the Mainland resident must take proceedings to enforce his claim, in which case, the Director of Immigration would not usually remove him until the case is disposed of. Thirdly, during the course of the **Ng Ka Ling** and **Chan Kam Nga** litigation, the Director of Immigration refused to give a blanket undertaking to every person who had approached the Legal Aid Department and was only prepared to give an undertaking not to remove those who had been granted legal aid or who had applied for legal aid and were regarded by the Legal Aid Department as having a meritorious case.

191. There were some differences in the wording of the Chief Executive's announcement and the press release. The Chief Executive did no more than convey a general outline of the policy decision, while the press release provided more details, converting the general policy into more specific criteria which would enable decisions to be made in particular cases or categories of cases. As the policy decision, the announcement and the press release were made almost contemporaneously, they should be considered together.

192. Viewed in its context, we think the meaning of the policy decision is reasonably clear. It allows a person to benefit from the two Court of Final Appeal judgments if

> (1) he was in Hong Kong during the period between 1 July 1997 and 29 January 1999; and

(2) he had lodged a claim for right of abode to the Immigration Department during that period.

Applicable principles

193. The applicants' case on the Concession issue is that the Chief Executive had made a public announcement setting out the conditions to be satisfied before any applicant can be treated in the same position as the actual parties to the **Ng Ka Ling** and **Chan Kam Nga** litigation. As a result of this public announcement, the applicants have a legitimate expectation that, if they satisfy these conditions, they would receive the same treatment as the actual parties to the litigation and would benefit from the two Court of Final Appeal judgments and have their claim of right of abode verified according to these two decisions. To frustrate such a legitimate expectation would be unfair to the applicants and constitute an abuse of power, according to the argument. It is alleged that the Director of Immigration had frustrated this expectation by misinterpreting the statement of policy set out in the public announcement and imposing additional conditions. The applicants submit that this amounts to an error of law or, alternatively, that the Director of Immigration acted irrationally in his application of the policy decision. According to the applicants, the judges in the courts below misunderstood the subject matter of the legitimate expectation and erred in saying that the government's announcement amounted to a broad statement of the policy only and that it was up to the Immigration Department to flesh out the necessary details for its implementation.

194. The applicants' argument is based mainly on the assumption that the policy decision consisted only of the Chief Executive's announcement. As we have explained, the Chief Executive's announcement cannot be viewed in isolation. The Concession was a policy decision of the Executive Council which was expressed in the public announcement and the press release. The government is of course free to formulate its policy. But it is for the court to ascertain what the policy decision means (**R v. Ministry of Defence, Ex parte Walker** [2000] 1 WLR 806 at 810 D). The court is, however, not concerned with whether the policy is good or bad unless it can be shown to be so irrational or that no reasonable government could have adopted it, **Walker** at 812D. It follows that it is for the court to consider whether the government in the implementation of the policy, has misinterpreted or misapplied it, **Walker** at p.810D, 817E.

195. If the meaning of a policy is clear, and if the government has misinterpreted it, the misinterpretation amounts to an error of law. Where the meaning is not clear, or the policy is susceptible of more than one meaning, and the government has adopted a particular meaning, it is for the court to consider whether the adoption of that meaning is such as to be "so aberrant that it cannot be classed as rational". See **R v. Monopolies and Mergers Commission & another, Ex parte South Yorkshire Transport Ltd. & another** [1993] 1 WLR 23, 32H, per Lord Mustill; cited in Walker at 813A, per Lord Slynn of Hadley.

196. The same rationality test applies equally to the application of policy. While an interpretation of policy involves the ascertainment of what it is or what it means, an application of policy involves the making of a decision applying the policy as so ascertained to all the relevant circumstances. It presupposes that the person entrusted to carry out the policy is correctly interpreting the policy. In some cases, the person who formulates the policy is the same person who is to apply it. For this reason, where a decision is challenged, it is sometimes attacked on the ground that the decision maker has both misinterpreted and misapplied the policy. It would be odd if rationality is used as a test for the correctness of the interpretation of policy but a different test is used for questioning its application.

197. Applying this test, the consequence is that a decision occasioned by a misinterpretation of policy which is either an error of law or is irrational or by a misapplication of policy which is irrational, will be quashed. The government is then left to make a fresh decision in accordance with the proper interpretation of the meaning of the policy statement.

198. In the present case, the only legitimate expectation which the applicants could have is to have the policy decision, whatever it is, as interpreted by the court, applied to them (**Walker** at 816B, per Lord Hoffmann). This is not a case in which government made a promise to the applicants apart from the policy. The applicants' expectation is that if they were in Hong Kong during the period between 1 July 1997 and 29 January 1999 and had lodged a claim for right of abode with the Immigration Department during that period, they would have their claims for right of abode verified according to the Court of Final Appeal judgments.

199. The question which then arises is: has the Director of Immigration misinterpreted or misapplied the policy decision?

The Director of Immigration's interpretation of the policy

200. In order to implement the policy decision, the Immigration Department has adopted certain criteria that must be met by persons who claim to fall within the policy. They require that (1) the person must have been present in Hong Kong during the period from 1 July 1997 to 29 January 1999; (2) during that period, he had made a claim to the Immigration Department for the right of abode; (3) he was physically in Hong Kong when the claim was made; and (4) the Director of Immigration has a record of such a claim.

201. According to these criteria, apart from the named parties in the **Ng Ka Ling** and **Chan Kam Nga** cases, the following categories of persons were accepted by the Director of Immigration as falling within the policy decision:

(1) persons covered by an agreement and undertaking not to remove them pending the outcome of those cases;

(2) persons applying for extension of stay or non-removal on the ground they wished to await the outcome of those cases;

(3) illegal immigrants and overstayers who had surrendered to the Immigration Department or were arrested and had resisted removal on the ground that they had the right of abode in Hong Kong;

(4) persons who were arrested by the police, were referred to the Immigration Department and had made a claim for right of abode when they were interviewed;

(5) persons who had made applications for verification of eligibility for permanent identity cards under para. 2(c) of Schedule 1 of Immigration Ordinance and were physically in Hong Kong;

(6) persons other than the *Ng Ka Ling* and *Chan Kam Nga* parties who had personally commenced proceedings;

(7) persons who were granted legal aid from July 1997 to September 1997 in order to take proceedings to claim a right of abode and the Director of Immigration had undertaken not to remove them; and

(8) persons who were referred to the Immigration Department by the Legal Aid Department under an express agreement made on 14 October 1997 whereby the Director of Immigration agreed not to remove them as they were regarded by the Legal Aid Department as having a meritorious case but legal aid was withheld in order to save public funds.

202. The applicants complain that the Director of Immigration was wrong to impose the additional criteria requiring that a claim could only be made to the Immigration Department and that an applicant must be present in Hong Kong when the claim was made. These complaints relate to the Director of Immigration's interpretation of the policy decision. The applicants also allege that the Director of Immigration was wrong in requiring that there must be a record of the claim with the Immigration Department and in deciding what did or did not amount to a claim of right of abode. This argument is directed to his application of policy to individual applicants.

To whom could a claim be made

203. According to the Chinese text of the transcript of the media session held by the Chief Executive, it was stated that the persons who would not be affected by the Interpretation were persons who had claimed the right of abode "to the authorities" whereas in the English version, these words did not appear. The applicants submit that this may be taken to mean that the policy decision permits claims to have been made to government agencies other than the Immigration Department. However, the contemporaneous press release was much more specific. In both the Chinese as well as the English texts, it was stated that the intended beneficiaries of the decision were those who approached or lodged claims with the Immigration Department.

204. It is also alleged that the Secretary for Security had said during a radio interview that an approach to the Legal Aid Department would also be considered as sufficient for the making of a claim for right of abode. The transcript showed that on that occasion, she said:

> "He (a claimant) had to be present in Hong Kong between 1 July 1997 and 29 January (1999), no matter whether he is still here now. The second condition is that he must have approached the Immigration Department or the Legal Aid Department during that time to claim his right of abode and that the Immigration Department or the Legal Aid Department have such record."

205. The Secretary for Security explained in her affidavit that her reference to the Legal Aid Department at the interview was meant to be a reference to those persons who had been granted legal aid and were represented by Messrs Clarke & Liu and those who had applied for legal aid and were regarded by the Legal Aid Department as having a meritorious case; both these types of persons having been given an undertaking by the Director of Immigration not to remove from Hong Kong pending the outcome of the proceedings. There is no reason to reject what the Secretary for Security said on this point. And there is nothing in the evidence which justifies treating what may have been a mistaken statement of the policy as a binding promise. See *Begbie* at first instance, per Maurice Kay J., judgment delivered on 12 July 1999, transcript p.7.

206. When the policy decision is considered in the light of its preceding history, it is reasonably clear that the Executive Council intended the policy to benefit only those who had lodged claims for right of abode with the Immigration Department or whose claims had been referred to the Immigration Department by government agencies in the course of their duty.

Presence in Hong Kong when claim was made

207. The applicants submit that it was not part of the requirement that the applicant must be physically present in Hong Kong when the claim was made, only that he must be in Hong Kong between 1 July 1997 and 29 January 1999 and had lodged a claim during this period. In other words, these are two separate requirements. On the other hand, the Director of Immigration argues that when the policy is properly understood, it means that the person must have made a claim when he was in Hong Kong during the relevant period.

208. This requirement was not expressly spelt out in the policy decision made by Chief Executive in

Council or in the Chief Executive's announcement. The second paragraph of the press release was, however, quite specific in limiting the benefit of the policy to persons who had lodged "claims with the Director *whilst in Hong Kong*", as was the ninth paragraph of the press release. In our view, the elaboration or elucidation of the policy decision to include the requirement that a claim to qualify under the policy must have been made by an applicant when he was physically present in Hong Kong is a rational interpretation and application of the policy decision. After the enactment of the No. 3 Ordinance, a Mainland resident, as all these applicants are, could only apply for a certificate of entitlement in the Mainland. There was no other way in which a Mainland resident could claim the right of abode. Between 1 July 1997 and 29 January 1999, the Immigration Department was faced with the problem created by Mainland residents who had come to Hong Kong either illegally or on two way permits, but had refused to return to the Mainland and had made claims for right of abode in various ways while they were here. The policy decision was clearly targeted at persons who had taken proceedings or were likely to take proceedings against the Director of Immigration and was intended to create an exception for them. It was clearly not intended to benefit any person who happened to have been in Hong Kong between 1 July 1997 and 29 January 1999 for any period of time and for whatever purpose and chose to make a claim to the Immigration Department when he was no longer in Hong Kong.

Requirement of a record

209. Neither the policy decision nor the Chief Executive's announcement nor the press release made any reference to a requirement that the Director of Immigration should have a record of a claim. The applicants submit that it is wrong for the Director of Immigration to impose such additional condition, particularly when there is evidence to suggest that the Immigration Department's records are far from complete.

210. It would be extremely difficult, if not impossible, to implement the policy decision, indeed any policy, without a record of some kind to verify whether a person falls within the policy or not. As the Assistant Director of Immigration, Mr Mak, said in his affidavit, "if the Concession Decision was not limited to those persons of whose claims for right of abode the Director of Immigration had a record, there would be no clear, objective or uncontroversial basis on which the Director of Immigration would be able to determine whether a claimant was in Hong Kong and had made a claim for right of abode during the period from 1 July 1997 to 29 January 1999."

211. It is accepted that the Immigration Department did not have copies of some of the letters written by a few applicants. But that is a matter of evidence in individual cases. There is no evidence to the effect that the record system of the Immigration Department is so unreliable as to create any serious problem in the implementation of the policy decision. The requirement of a record is a reasonable and rational application of the policy decision.

What amounts to a claim

212. There was no specified way or form for making a claim for right of abode in order to qualify under the policy decision. The criterion adopted by the Immigration Department was, according to the Assistant Director, that "the assertion of right of abode must have been formalised in some way for the Director of Immigration to be able to identify those persons as having lodged a claim for right of abode by the Director of Immigration having a record of such claim". The Director of Immigration requires that, to constitute a claim, there must either be something in writing or it was made in such a way that the Immigration Department would have kept a record of it. In other words, it need not be in writing, but there must be a record of such claim with the Department. In our view, this requirement is neither a misinterpretation of the policy decision nor misapplication of it.

213. The applicants contest the application of this requirement in particular instances. In the Amended Application for judicial review, several types of conduct are alleged to constitute a claim.

The applicants' complaint is that in his implementation of the policy: (1) the Director of Immigration had wrongly rejected certain types of conduct as not amounting to a claim for the purpose of the policy decision; (2) there is evidence to the effect that Immigration staff had turned away claimants who approached the Immigration Department and wanted to lay claims for right of abode but no records of such claims were kept by the Immigration Department; (3) the Director of Immigration had accepted claims made in certain forms but rejected claims made in similar forms and this constitutes unfair treatment towards some of the applicants; and (4) the Director of Immigration had adopted too restrictive a construction of the letters of claim submitted to him.

214. As the question of what amounts to a claim concerns many of the applicants represented by these representative applicants, it is necessary to consider each of the types of claim alleged to have been made by them and whether any rejection by the Director of Immigration was irrational.

(1) Presence/overstaying in Hong Kong

215. The applicants argue that by mere presence or overstaying in Hong Kong (of which the Director of Immigration must have a record), an applicant can be considered as asserting his right of abode here. This cannot be right. There can be many reasons, other than assertion of the right of abode, for presence or overstaying in Hong Kong. Even if a person falls within art. 24(2)(3), he cannot exercise his right of abode until he has established his permanent resident status in accordance with the No. 3 Ordinance. If he is an illegal immigrant or overstayer, his presence or continued presence in Hong Kong is in breach of the immigration laws. He is liable to be arrested by the police and be removed. He cannot expect to be recognised as a claimant for the right of abode if he does not come forward and assert his right, if any, to the Immigration Department. The Director of Immigration has rightly rejected this type of claim as one which does not fall within the policy decision.

(2) Applying for one-way permit/certificate of entitlement

216. It is alleged that an application made to the Public Security Bureau in the Mainland for a one-way exit permit or certificate of entitlement during the Concession period should also be regarded as a claim since it was made to an agent of the Immigration Department. This argument cannot be accepted. Applications of this kind were made pursuant to the provisions of the No. 3 Ordinance. Neither the policy decision nor the reasons behind it were directed to claims of this kind. In most cases, applications of this kind to the Public Safety Bureau would have been made while the applicants were in the Mainland and not physically in Hong Kong.

(3) Approaching the Legal Aid Department

217. As we have seen, from early July 1997, quite a large number of persons approached the Legal Aid Department for assistance. Some of them were granted legal aid to commence proceedings or join in existing proceedings. They were given undertakings by the Director of Immigration not to be removed pending the outcome of the **Ng Ka Ling** and **Chan Kam Nga** cases. There were others who had applied for legal aid and were considered as having a meritorious case, although legal aid was not granted to them in order to conserve public funds. These persons were notified by the Legal Aid Department to the Director of Immigration and were given undertakings that they would not be removed pursuant to an agreement between the two departments in October 1997. Persons coming within these two categories are accepted by the Director of Immigration as falling within the policy decision.

218. Apart from these persons, there are 3 other groups of persons who had approached the Legal Aid Department that need to be considered: (1) those who alleged that they had been turned away by the Legal Aid Department without being registered or allowed to make an application; (2) those who had applied for legal aid and were referred to the Immigration Department with a request that if the Director of Immigration decided to remove any of them, the Legal Aid Department should be

informed; and (3) those who went to the Legal Aid Department between 8 December 1998 and 29 January 1999 and had their applications registered and given Legal Aid pro forma replies saying that they need not take any action pending the outcome of the appeals to the Court of Final Appeal.

219. According to the evidence, it was the practice of the Legal Aid Department to accept applications and consider their merits in order to decide whether to grant legal aid or not. Those persons who were "turned away" were likely to have been people who had made general inquiries only and had been informed by the staff of the rulings of the court at the relevant time. If they were not merely making enquiry and were serious about their claims, they would have insisted on applying for legal aid to pursue their claims and their applications would normally have been accepted and considered, even if consideration resulted in refusal of the application. There were also those persons who had been granted legal aid but later, upon legal advice, had their legal aid certificates discharged. However, after the **Chan Kam Nga** decision at first instance was publicised, if they had applied again, they would have been reconsidered. In any event, the approach which these persons made to the Legal Aid Department cannot be regarded as a claim because it was not a claim made to the Immigration Department of which there was a record.

220. As regards those persons who had applied for legal aid but were referred to the Immigration Department with a letter requesting notification in case a removal order was to be made, it is not clear whether they were cases which the Legal Aid Department did not consider as meritorious cases. However, the cases within this group, whether meritorious or not, were cases in which the applicants were intending to claim the right of abode in Hong Kong through the courts, hopefully with the assistance of the Legal Aid Department. If they had not intended to take the government to court, they would not have applied for legal aid. The steps which they took and the steps taken on their behalf by the Legal Aid Department were steps to lay a claim. Since their names were notified to the Immigration Department, the Director of Immigration should have a record of their claims. Persons in this category should rationally be treated as having lodged a claim with the Immigration Department. However, there may not be any representative applicant in this category.

221. With regard to those who had registered with the Legal Aid Department between 8 December 1998 and 29 January 1999, again their intention to lodge a claim for right of abode was sufficiently clear. However, the Legal Aid Department did not process their applications for legal aid but wrote the Legal Aid pro forma replies to them saying that they need not take any action since the Court of Final Appeal would soon be hearing and determining the same issues. Unfortunately, the Legal Aid Department did not forward their names, about 1000 in number, to the Immigration Department before the end of the Concession period. This may be understandable in view of the large number of applicants during this period of less than two months. The list was only forwarded to the Immigration Department about a year later in December 1999. In other words, while these persons had intended to lodge a claim for right of abode through the Legal Aid Department, their claims were not processed, and the Immigration Department at the relevant time did not have any record of their claims. Hence, these claims do not fall within the policy decision. However, as discussed earlier under the section on the legitimate expectation issue, the Legal Aid pro forma replies which they received can be considered as constituting a specific representation which gave rise to a legitimate expectation that they would be treated in the same way as parties to the **Ng Ka Ling** and **Chan Kam Nga** cases.

(4) Applying for extension of stay

222. The applicants argue that an application for an extension of stay should be regarded as a claim for right of abode with the Immigration Department. In this connection, it is also alleged that the Immigration Department had acted unfairly in that it had treated certain applications for extension of stay as amounting to a claim but rejected others made in a similar form. This happened to applications which were processed after 26 June 1999.

223. When a Mainland resident comes to Hong Kong on a two-way permit whether for sight-seeing, visiting family members, or other purposes, he will normally be allowed to stay until a certain date. If he applies for an extension of stay, he is expected to provide some reasons. In those cases in which the Immigration Department regarded an application for extension of stay as constituting a claim for right of abode for the purpose of the policy decision, the reason given in the application was either an assertion of a right of abode in Hong Kong or permanent resident status or a request to stay here in order to wait for the judgments of the Court of Final Appeal in the **Ng Ka Ling** and **Chan Kam Nga** cases. The reason for waiting for these judgments was obvious: they wanted to be treated in the same way as the parties in those cases. There were also illegal immigrants or overstayers who, when they were interviewed, gave the same reasons in order to resist removal. In all these cases, the Immigration Department had accepted such assertions and requests as amounting to a claim under the policy decision.

224. Where a person did not indicate in his application for extension of stay or in his interview with Immigration staff that he was claiming a right of abode or that he wanted to await the judgments, but instead relied on other grounds, the Director of Immigration was entitled to regard the application or statement in the interview report as not amounting to a claim for the purpose of the policy decision. There is no question of unfair or differential treatment. If a person wanted to continue to stay in Hong Kong, it was for him to indicate his real reason for doing so and that he was asserting a right of abode. There is no reason why he should not and could not convey this in his application or interview.

225. There is a suggestion by counsel that in some cases, applicants who wanted to have an extension of stay or to resist removal were "pressurised" into putting down in their application forms or interview reports standard answers prompted by the Immigration staff which did not contain an assertion or claim of right of abode. This is a matter of evidence to be dealt with in individual cases.

(5) Approaching the Immigration Department

226. It is alleged that some applicants either personally or by their parents or relatives went to the Immigration Department to make a claim for right of abode. Some even brought with them documents supporting their claims. They were however discouraged or dissuaded from doing so. The standard response by the staff of the Immigration Department was that they should return to the Mainland and apply to the authorities there for one-way exit permits or certificates of entitlement. It is submitted that they were wrongly rejected as having only made inquiries and the Director of Immigration had failed to keep any record of such claims.

227. These complaints must be understood in the light of the prevailing circumstances. According to the Immigration staff, there were well over one million inquiries a year at the immigration counters or through the telephone. It is difficult to expect that a record would be kept for all these inquiries. The Immigration staff's standard response was indeed stating what the law was or what they understood it to be. If a person had really wanted to make a claim for right of abode as opposed to making a general inquiry, he should not have been deterred by such response. The evidence is that where a person attending the Immigration Department wished to make a claim and had brought with him the relevant documents, he would be referred to a senior officer. He would be interviewed and a record would have been kept of such interview. The Director of Immigration cannot be criticised for rejecting persons who were merely making inquiries as not qualifying under the policy decision.

(6) Writing to the Immigration Department or other government departments

228. Some letters written by applicants to the Immigration Department or other government agencies were rejected as not being sufficient to amount to a claim under the policy decision. Counsel submits that the Director of Immigration has adopted too restrictive an interpretation of some of the letters.

229. The letters fall into two categories: first, those addressed to the Immigration Department and, secondly, those addressed to other government officials or agencies such as the Chief Executive, Secretary for Justice and Secretary for Security. The letters in the second category would inevitably be referred to the Immigration Department for a more informative reply other than a standard response. It is reasonable to regard these letters as being intended for the Immigration Department. A number of these letters were rejected as not amounting to a claim for various reasons. Our consideration is confined to the question whether the letters should be regarded as making a claim for the right of abode.

230. In order to decide this question, it is necessary to bear in mind the events which occurred during the period from July 1997 until the end of January 1999. It had been widely publicised that many Mainland residents in Hong Kong were claiming a right of abode here. Many of them applied for legal aid in order to pursue their claims through the courts. Government officials made public statements about those cases. The courts at different levels made various decisions on some of the representative cases. The Immigration Department was swamped by Mainland applicants either asserting their right of abode or applying for extension of time or resisting removal. Many of them were not well educated. Almost all of them wrote in Chinese. Some of them had been frustrated by the long wait to come to Hong Kong. Their understanding of the various court decisions would not have been comprehensive or precise. Letters were couched in polite or even apologetic terms.

231. In these circumstances, we take the view that the rational approach should be to judge whether a claim was in substance being made. So long as the message was clear and could reasonably be understood to constitute a request to be granted the right of abode in Hong Kong, this was enough to constitute a claim. It would be wrong in these circumstances to construe the letters written by lay people strictly as if they were formal legal documents.

232. In our view, a letter should be reasonably understood as making in substance a claim to the right of abode if it clearly (1) identifies a person as a Hong Kong permanent resident and another person as his child; (2) provides some details such as his or her date or place of birth; and (3) asks for the child to come to Hong Kong to either settle or to enjoy his right of abode. It is not necessary to use words like "claim", "demand", "assert" or "right". Reference to the Basic Law or its specific provisions is unnecessary, although such a reference is indicative of a claim of right. Even stronger are claims where the letters are accompanied by supporting documents.

Application of policy to representative applicants

233. It is common ground that applicants who arrived in Periods 4 and 5 are not within the policy decision. Applying the criteria of the policy and the principles in assessing the rationality of the Director of Immigration's decisions in implementing the policy as discussed above, our views on the representative applicants are as follows.

234. *RA1 - Ms Ng Siu Tung* - She was accepted by the Director of Immigration as coming within the policy decision. She is not seeking any relief.

235. *RA2 - Ms Ng Kam Chi* - As mentioned earlier, she was not regarded as an appropriate representative because of a number of factual disputes in her case.

236. *RA3 - Ms Lo Po Lai* - She is a Group A applicant who arrived in Period 1. She is put forward as a representative of those applicants whose parents attended the Immigration Department to make a claim for right of abode of which the Immigration Department has no record. Ms Lo relies on two occasions, 4 July 1997 and 7 January 1999, when her father attended the Immigration Department. Such attendance at the Immigration Department does not amount to making a claim within the policy decision.

237. On a personal basis, Ms Lo also relies on an occasion (in May 1998) when her father approached the Legal Aid Department for assistance. This does not amount to a claim of which the Director of Immigration has a record.

238. Ms Lo does not qualify under the policy decision. However, she succeeds as a Group A Period 1 applicant on the Periods 1 and 2 issue.

239. *RA4 - Ms Chu Chun Man* - She is a Group B applicant who arrived in Period 1. She is put forward as a representative of those applicants who allege that their mere presence as overstayers amounted to a claim of right of abode. It is said that this would be known to the Director of Immigration through his records. Mere overstaying does not amount to a claim within the policy decision.

240. On a personal basis, Ms Chu also relies on her approaching the Immigration Department and the Legal Aid Department to lodge her claim. These approaches occurred outside the Concession period.

241. Ms Chu does not qualify under the policy decision.

242. *RA5 - Mr Tam Siu Ming* - He is a Group A applicant who arrived in Period 2. He was issued a one-way exit permit after the Court of Appeal judgment. But he is put forward as a representative in relation to four issues.

> (1) He is one of the applicants whose written claim was rejected on the ground that he was not in Hong Kong when the claim was made. One of the conditions of the policy decision is that a person must be present in Hong Kong when he made his claim. Such a claim does not satisfy this condition.
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> (2) He is a representative of those who had lodged a written claim of which the Director of Immigration has a record but which he rejected as not constituting a claim. The applicant relies on two letters which his mother had written on his behalf to the Immigration Department (25 July 1997) and to the Chief Executive (1 October 1997). Each letter had identified him as a child of a parent who is a Hong Kong permanent resident and requested that he be granted a right of abode. These two letters amount to a claim of which the Director of Immigration has a record.
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> (3) He is also a representative of those applicants who had made an application for a certificate of entitlement or one-way exit permit to the Public Security Bureau in the Mainland during the Concession period. Such an application does not constitute a claim within the policy decision.
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> (4) He is a representative of those applicants who attended either personally or by his relatives the Immigration Department bringing with them relevant documentary evidence and asserting a right of abode but the Director of Immigration has no record of such attendance. He attended with his family on 12 July 1997 at the Immigration Department and was told that he must return to the Mainland to apply. This is not a claim within the policy decision.

243. Although the two letters which he sent to the Immigration Department amount to a claim of which the Director of Immigration has a record, he was not physically present in Hong Kong when the two letters were submitted. He fails to satisfy all the conditions of the policy decision. Since he was already issued a one-way exit permit, he is not personally claiming under the policy decision.

244. *RA 6 - Mr Lee Wang Lung* - He is a Group B applicant who arrived in Period 3 (but he left and

returned on subsequent occasions). He is put forward as a representative in relation to two issues.

(1) He is a representative of those applicants who applied to the Legal Aid Department to lodge a claim but the Director of Immigration has no such record. His family members applied (on 31 July 1997) for legal aid on his behalf to bring proceedings to assert his right. His application was refused on 9 August 1997, i.e. at the time when the Legal Aid Department, acting under counsel's advice, considered that Group B applicants did not have any merits. There was no follow-up. This does not amount to a claim within the policy decision.

(2) He is also a representative of those applicants who attended the Immigration Department bringing with them relevant documentary evidence to assert a right of abode but there is no record kept by the Director of Immigration. He went with his family to the Immigration Department on 31 July 1997 and was told that he could not do so and there was no procedure. The Immigration Department does not have a record of such attendance. This does not amount to a claim under the policy decision.

245. He does not qualify under the policy decision.

246. *RA7 - Mr Lau Kong Yung* - He is a Group A applicant who arrived in Period 3. Since the commencement of the proceedings, he had been granted a one-way exit permit but remains as a representative applicant for the benefit of the other applicants in relation to four matters.

(1) He is representative of those applicants who sent written claims to the Director of Immigration of which there is a record but such claims were rejected as not amounting to a claim. He wrote to the Immigration Department on various occasions: namely, on 2, 6, 17, 22, and 25 January 1999. In his letters, he claimed to be a child of his parents who are Hong Kong permanent residents and requested to have the right of abode. He also enclosed various documents. He was advised to submit his application in the Mainland. These letters were regarded by the Director of Immigration as amounting only to an inquiry. We consider that these letters contained the essential matters which we have discussed and each of them is sufficient to amount to a claim.

(2) He is also a representative of those applicants who sent written claims to the Immigration Department of which there is a record but they were rejected because it was alleged that the Director of Immigration was not aware that he was present in Hong Kong at the time of the claims. We consider that it is a matter of evidence in each individual case. If it can be shown by a particular applicant that he was present in Hong Kong at the time when his letter was sent to the Immigration Department, and his letter contains the essential matters which we have discussed, he falls within the policy decision. There is no need for the Director of Imigration to have been aware that that person was in fact present in Hong Kong. However, it is not necessary to deal with Mr Lau's case since he had already been granted a one-way exit permit.

(3) He is also a representative of those applicants who had alleged to have telephoned the Immigration Department of which there was no record. Telephone inquiries do not amount to a claim. They are not covered by the policy decision.

(4) He is a representative of those applicants who attended the Immigration Department bringing with them relevant documentary evidence and asserted a right of abode but there is no record of such attendance kept by the Immigration Department. He attended in December 1998 with his parents and was told to return to the Mainland to apply. There is no record of such attendance. His father had made an application to amend the particulars of his own identity card and in the application form, it was stated that he

wanted to make an inquiry for his son on the procedure for obtaining a certificate of entitlement. This was rejected as not being a claim but only an inquiry. Such inquiries of which the Director of Immigration has no record do not amount to a claim within the policy decision.

247. *RA8 - Mr Lau Pong* - He is a Group B applicant who arrived in Period 3. He is put forward as a representative in relation to three issues.

(1) He is a representative of those applicants who made an application to the Legal Aid Department of which the Director of Immigration has no record during the Concession period. He made an application for legal aid on 27 July 1998. The Director of Immigration was not aware of this application until July 1999. This does not amount to a claim since it was not a claim lodged with or referred to the Director of Immigration within the Concession period.

(2) He is also a representative of those applicants who made written claims to the Director of Immigration of which there is a record but they were rejected as not amounting to a claim. Mr Lau did not give any details of his letters to the Director of Immigration. However he also relies on a petition from a family concern group which was sent to the Chief Executive on 19 April 1998 and was alleged to contain details of various children of Hong Kong permanent residents including Mr Lau's details. Where a petition identifying the relevant details was sent to the Chief Executive, it was expected that it would be referred to the Immigration Department. In fact, it was referred to the Secretary for Security. Subsequently follow-up letters dated 29 June and 26 October 1998 were sent to the Security Bureau as well as the Director of Immgration. This form of claim should be regarded as having been made to the Immigration Department. If such letters or petition contained the necessary details, they were specific enough as to amount to a claim albeit that they purported to cover a number of applicants. However, even if the petition and follow up letters from the family concern group could amount to a claim, Mr Lau was not present in Hong Kong when they were presented.

(3) He is a representative of those applicants who attended the Immigration Department bringing with them relevant documentary evidence and asserted a right of abode but there is no record of such attendance kept by the Immigration Department. He attended the Immigration Department on two occasions in July 1998. There is no record of such attendance. They do not amount to a claim.

248. Mr Lau does not qualify under the policy decision.

249. *RA9 - Ms Lin Li Pin, Penny* - She is a Group B applicant who arrived in Period 3. There were factual disputes in respect of Ms Lin's case and she was considered unsuitable as a representative. Yet she is put forward as a representative of those applicants who attended the Legal Aid Department during the Concession period. She was advised that she could not join in the litigation then before the court, that she did not need to apply for legal aid and that she need only wait for the outcome of the cases pending before the court. Such an approach to the Legal Aid Department of which the Director of Immigration has no record does not amount to a claim within the policy decision.

250. *RA10 - Ms Lau Kwai Fong* - She is a Group B applicant who arrived in Period 3. She is a representative of those applicants who attempted to make an application for a certificate of entitlement or one-way exit permit to the Public Security Bureau in the Mainland during the Concession period. Her application to the authority in the Mainland was apparently made in May 1996. She was told that she was not eligible. This type of application does not amount to a claim.

251. Ms Lau does not qualify under the policy decision.

252. *RA11 - Mr Chan Kei Yui* - He is a Group B applicant who arrived in Period 3. He is a representative of more than 1,000 applicants who had approached the Legal Aid Department during the period between December 1998 to January 1999 and were issued the Legal Aid pro forma replies informing them that there was no need to start any action in view of the pending court cases. This does not amount to a claim of which the Director of Immigration has a record since the Immigration Department was not notified of these applications within the Concession period.

253. He does not qualify under the policy decision. But as a recipient of the Legal Aid pro forma replies, he falls within the class of specific representees who claim to have a legitimate expectation.

254. *RA12 - Ms Wong Yuk Heung* - She is a Group B applicant who arrived in Period 4. Although she does not claim under the policy decision, she is put forward as a representative of those applicants who had made written claims for right of abode to the Director of Immigration of which there is a record but were rejected as not amounting to a claim. Ms Wong's father had written a number of letters to the Chief Executive and the Immigration Department (on 3 April, 23 September, 15 October and 16 November 1998). If her letters contained the essential elements which we have discussed, they should be regarded as a claim within the policy decision.

255. *RA13 - Mr Yuan Zhi Wei* - He is a Group B applicant who arrived in Period 4. Although he is outside the policy decision, he is put forward as a representative of those applicants who had made written claims to the Director of Immigration of which there is a record but were rejected as not amounting to a claim. Mr Yuan's father had written on a number of occasions to the Chief Executive, Secretary for Justice, Secretary for Security and the Immigration Department (25 May, 1 June, 14, 21 July, 21, 28 September, 19 October, 17 November 1997, 6 and 7 April 1998). If these letters contained the essential elements which we have discussed, they should be sufficient to amount to a claim within the policy decision.

256. Since he is a Period 4 applicant, he does not make any claim under the policy decision. But as a recipient of the letter dated 24 April 1998 from the Secretary for Security, he does fall within the class of specific representees who claim relief on the basis of a legitimate expectation.

257. *RA14 - Mr Sze Wing Lam* - He is a Group A applicant who arrived in Period 4. Although he is outside the policy decision, he is put forward as a representative in relation to two matters.

> (1) He is a representative of those applicants who had applied to the Public Security Bureau for a one-way exit permit or certificate of entitlement. He applied in May 1997 and got a reply from the Immigration Department on 29 May 1997 requesting for documents and asking his mother to go to the Immigration Department. A form was filed in June 1997. An application to the Public Security Bureau does not amount to a claim under the policy decision.
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> (2) He also relies on a phone call which a relative of his made (in October 1998) to the Immigration Department making an inquiry. The Immigration Department has no record of such inquiry. This does not fall within the policy decision.

258. On a personal basis, he relies on a letter written by his solicitors to the Immigration Department on 30 June 1998. There was a reply on 12 October 1998 saying that since he was born before 1 January 1983, he did not qualify for permanent resident status. The Director says that this letter from his solicitors only asked for an entry permit and contained no assertion for a right of abode. If his letter contained the essential elements, it should be regarded as a claim. However, it would seem that he was then not physically in Hong Kong.

259. *RA15 - Ms Yip Yam Wa* - She is a Group B applicant who arrived in Period 4. She is outside the policy decision and does not make any claim under it.

260. *RA16 - Ms Kwong Kin Ting* - She is a Group B applicant who arrived in Period 4. She is outside the policy decision. The only relevant matter which she relies on is her application on 4 July 1998 to the Public Security Bureau in the Mainland for a one-way exit permit while she was in the Mainland. This does not amount to a claim under the policy decision.

261. *RA17 - Ms Wong Hon Lu***n** - She is a Group B applicant who arrived in Period 5. She is outside the policy decision. She relies on an application to the Public Security Bureau in the Mainland on 22 November 1996 for a one-way exit permit. This does not amount to a claim. She also relies on various letters which her father had written to the Chief Executive and other Chinese organisations in Hong Kong e.g. Xinhua News Agency (18 July 1997, 18 December 1997 and 28 January 1999). They were regarded by the Immigration Department as requests for assistance or a plea and not amounting to a claim. Even if these letters contained the essential elements we have discussed, they were not written while she was in Hong Kong.

262. *RA18 - Mr Tang Kam Ching* - He is a Group A applicant who arrived in Period 5. He is outside the policy decision. The only relevant matter which he relies on is his application to the Public Security Bureau in the Mainland in November 1998 for a certificate of entitlement. Such application does not amount to a claim within the policy decision.

263. *RA19 - Mr Hung Kam Chuen* - He is a Group B applicant who arrived in Period 5. He is outside the policy decision. The only relevant matter which he relies on is an inquiry "in 1997" for a one-way exit permit and he was told that this was not possible. This is not a claim within the policy decision.

264. *Ms Li Shuk Fan* (HCAL 2/2000) - She is a Group B applicant who entered Hong Kong in Period 3. She was allowed to have her case determined together with the other cases because of her medical condition. Stock J considered that there are exceptional circumstances which required her case to be heard as soon as possible.

265. She entered Hong Kong on 19 February 1998 on a two-way permit. On 5 March 1998, she applied for an extension of stay, but was only given a few days. She then overstayed. On 18 September 1998, she went with her father to the Immigration Department and applied for verification of her eligibility for a permanent identity card. This was refused by the Immigration Department. Ms Li was asked to return to the Mainland and were given one week to do so. She was then hospitalised because of her mental condition. On 4 December 1998, her father had written a letter to the Immigration Department. His letter was rejected as not amounting to a claim because it was only a request for her to settle in Hong Kong on humanitarian grounds. It is suggested that the letter was a plea by the father because at that time there was the Court of Appeal decision which was against her and that he knew there was no valid ground to apply for right of abode. In our view, whether it is a claim does not depend so much on his knowledge of that court's decision particularly when such decision was being challenged on appeal. It also does not depend on his understanding of the legal position. We take the view that it would be irrational not to regard the letter as satisfying all the essential elements we have discussed and amounting to a claim. In any event, her application for verification of eligibility for identity card in September 1998 would also have amounted to a claim of which the Immigration had a record. She qualifies under the policy decision.

266. *RA1 in FACV 3/2001 - Ms Sin Hoi Chu* - She is a Group B applicant who arrived in Period 3 (she later left and subsequently came again in Period 5). She is a representative in relation to two matters.

(1) She is a representative of those applicants who had made oral claims to the

Immigration Department of which there is no record. She went to the Immigration Department in early February 1998 with her brother. They were asked whether she was eligible to apply for the right of abode and were told that she had to make her application in the Mainland. There is no record of such a claim. Oral claims of which the Immigration Department has no record do not amount to a claim within the policy decision.

(2) She is also a representative for those applicants who had made applications to the Mainland authorities for one-way exit permits. These do not qualify as claims.

267. She does not qualify under the policy decision.

268. *RA2 in FACV 3/2001 - Mr Chen Zhong Xiu (Chan Chung Sau)* - He is a Group B applicant who arrived in Period 3 (he later left and subsequently came again in Period 5). He relies on an oral claim: he went with his mother to the Immigration Department in September 1997. There is no record of such attendance. This is not a claim under the policy decision. He also relies on his application to the Public Security Bureau in the Mainland in October 1997. He was told that he was not eligible. This is also not a claim within the policy decision.

269. He does not qualify under the policy decision.

270. *RA3 in FACV 3/2001 - Ms Chau Yin Ping* - She is a Group B applicant who arrived in Period 5. She does not qualify under the policy decision. But she is put forward as an illustration of the treatment some applicants received when they were interviewed. She alleges that when she was interviewed (outside the Concession period), she was pressurised into inserting in the interview report standard answers given by the Immigration staff. If relevant, we consider that this is a matter of evidence to be dealt with in individual cases.

271. *RA4 in FACV 3/2001 - Mr Chung Chi Kwong* - He is a Group B applicant who arrived in Period 3 (he later left and subsequently came again in Period 5). He relies on an oral claim to the Immigration Department. He had gone with his mother and sister to the Immigration Department and said that he wanted to apply for right of abode. He was told that there was no procedure and he had to apply in the Mainland. There is no record of such a claim with the Immigration Department. It does not amount to a claim.

272. He does not qualify under the policy decision.

273. *RA5 in FACV 3/2001 - Mr Lam Chi Lok* - He is a Group B applicant who arrived in Period 1 (he later left and subsequently came again in Period 5). He also relies on his oral claim to the Immigration Department in late July 1997 and October 1997. There is no record of such claims with the Director of Immigration. It is also alleged, which is denied by the Immigration Department, that when he was interviewed, he was given a set of answers to choose from. If relevant, we consider that this is a matter of evidence to be dealt with in individual cases.

274. He does not qualify under the policy decision.

275. *RA6 in FACV 3/2001 - Ms Sin Siu Yin* - She is a Group B applicant who arrived on many occasions, two of which were during the Concession period. She also relies on her attendance with her mother at the Immigration Department when she asked for forms to enable her to apply to stay in Hong Kong for resettlement. This is a claim which the Immigration Department has no record.

276. She does not qualify under the policy decision.

277. *RA7 in FACV 3/2001 - Ms Yau Po Chun* - She is a Group B applicant who arrived in Period 4.

She makes no claim to be entitled to the benefit of the policy decision.

CONCLUSION

278. For the reasons set out above, we have reached the following conclusions on the five issues raised in these appeals.

(1) The "judgment previously rendered" issue

279. Upon the true construction of "judgments previously rendered shall not be affected" in art. 158 (3) of the Basic Law, the judgments in **Ng Ka Ling** and **Chan Kam Nga** are binding only on the actual parties in those cases. Since the applicants in these appeals were not parties in those cases, they are, unless they can succeed on another issue raised in these appeals, affected by the Interpretation and cannot benefit from the two judgments.

(2) The "legitimate expectation" issue

280. The statements made by the Director of Immigration on 13 July 1997 and the Chief Executive on 23, 31 July and 22 October 1997 to the effect that the government would abide by the decisions of the courts and would carry such decisions into effect, when considered in the light of the circumstances then prevailing and the test case character of the **Ng Ka Ling** and **Chan Kam Nga** litigation, amounted to a representation to the public that the government would treat persons who were in the same position as the parties in those cases as if they were parties thereto.

281. The Legal Aid pro forma replies sent to applicants for legal aid between 7 December 1998 and 29 January 1999 in which the Legal Aid Department stated that it was not necessary for them to join in existing proceedings or to commence fresh proceedings, amounted to a representation to those applicants that the government would carry into effect the decisions of the courts in the **Ng Ka Ling** and **Chan Kam Nga** cases and acted as an inducement to those applicants not to take the very action which, if taken, would have placed them in the same position as the parties to those pending cases and within the protection given to judgments previously rendered so that those applicants would also benefit from the two judgments.

282. The letter dated 24 April 1998 sent by the Secretary for Security to RA13 to the effect that the Immigration Department would follow the judgments of the courts in dealing with applications for certificate of entitlement, amounted to a representation to RA13 that his case would be dealt with in the same way as the parties in the **Ng Ka Ling** and **Chan Kam Nga** cases.

283. As a result of the Interpretation and the subsequent changes, the Director of Immigration is precluded by law from giving effect in full to the original legitimate expectation of persons to whom these representations were made.

284. However, notwithstanding the changes as a result of the Interpretation, the Director of Immigration has a discretion under ss. 11, 13 and 19(1) of the Immigration Ordinance to allow persons, who do not satisfy Part 1B of the Immigration Ordinance, to enter and reside in Hong Kong. He cannot, however, lawfully exercise such discretion in respect of an innominate class of persons since to do so will undermine the legislative scheme as a whole. Even if he could, he would be entitled to decide that whatever expectations these persons might have, they are overridden by the overwhelming force of immigration policy which underlies the immigration legislation validated by the Interpretation. Representees of the general representations made by the Director of Immigration and the Chief Executive cannot succeed on this ground.

285. In respect of the representees who were recipients of the Legal Aid pro forma replies and RA13 who received the letter dated 24 April 1998 from the Secretary for Security, the exercise of the

Director of Immigration's discretion under ss. 11, 13 and 19(1) of the Immigration Ordinance treating them as exceptional cases will not undermine the statutory scheme as validated by the Interpretation. Since the Director of Immigration did not consider their legitimate expectation or the extent to which such expectation could be lawfully addressed under these provisions at the time when he made the removal orders against these applicants, such orders must be quashed. These applicants are entitled to a fresh exercise of the Director of Immigration's discretions under ss. 11, 13 and 19(1) of the Immigration Ordinance so that the substantial unfairness to them generated by the Director of Immigration's failure to give effect to their legitimate expectation can be duly taken into account.

(3) The "abuse of process" issue

286. The making of a removal order and its execution do not form part of the curial process. It is an exercise by the Director of Immigration of his statutory powers. The removal orders against the applicants in these appeals and the execution of such orders do not amount to an abuse of the process of the court.

(4) The "Periods 1 and 2" issue

287. Those applicants who are Group A applicants (i.e., born after at least one of their parents had become a Hong Kong permanent resident) and who arrived in Hong Kong prior to 1 July 1997 (i.e., before the provisions of the Basic Law, particularly art. 22(4), took effect) are entitled to have their permanent resident status under art. 24(2)(3) verified in Hong Kong without the need to obtain one-way exit permits. After they have established their status, they are entitled to exercise their right of abode in Hong Kong.

288. Those applicants who are Group B applicants (i.e., born before either one of their parents had become a Hong Kong permanent resident) and who arrived in Hong Kong prior to 1 July 1997 are affected by the time of birth limitation in art. 24(2)(3) as interpreted by the Interpretation. They do not fall within art. 24(2)(3) and are not entitled to benefit from the judgment in **Chan Kam Nga**, unless they can succeed on another issue raised in these appeals.

289. Those applicants, whether they are Group A or Group B applicants, who arrived in Hong Kong in Period 2 (i.e., between 1 July and 10 July 1997) are caught by art. 22(4) as interpreted by the Interpretation which requires them to obtain one-way exit permits before coming to Hong Kong for the purpose of settlement. They are not entitled to benefit from the judgment in **Ng Ka Ling**, unless they can succeed on another issue raised in these appeals.

(5) The "Concession" issue

290. The policy decision announced by the Chief Executive on 26 June 1999 was a decision reached by the Chief Executive in Council as to who would be unaffected by the Interpretation. This policy decision must be considered in the light of the history of the **Ng Ka Ling** and **Chan Kam Nga** litigation, the events leading to the Interpretation, the object of and rationale behind the policy decision and the context of right of abode claims.

291. According to the policy decision, in order to benefit from the **Ng Ka Ling** and **Chan Kam Nga** judgments, an applicant must have been in Hong Kong within the period between 1 July 1997 and 29 January 1999 and had lodged a claim for right of abode to the Immigration Department during that period. The claim must be one made (1) to the Immigration Department; (2) during this Concession period; and (3) while the applicant was present in Hong Kong. When the policy decision is considered in the light of its preceding history, it is reasonably clear that the Executive Council intended the policy to benefit only those who had lodged claims for right of abode with the Immigration Department or whose claims had been referred to the Immigration Department by

government agencies in the course of their duty. There was no misinterpretation of the policy decision by the Director of Immigration.

292. There was no misapplication of the policy decision on the part of the Director of Immigration in requiring that there must be a record kept by the Immigration Department of a claim for right of abode.

293. However, having regard to the context and the circumstances in which the claims came to be made, the Director of Immigration has in certain cases departed from a rational approach in applying too strict a construction of what amounts to a claim falling within the policy decision. Any document which clearly (1) identifies a person as a Hong Kong permanent resident and another person as his child; (2) provides some details such as his or her date or place of birth; and (3) asks for the child to come to Hong Kong either to settle or to enjoy his or her right of abode, should be reasonably understood as making a claim to the right of abode. A rejection of a document which falls within these criteria would amount to a misapplication of the policy decision.

RELIEF

294. As a result of the conclusions reached above, we would make the following orders:

295. *RA3 in HCAL81 of 1999 - Ms Lo Po Lai* (who succeeds on the "Periods 1 and 2" issue as a Group A Period 1 applicant):

(1) the appeal is allowed;

(2) the removal order made against her is quashed;

(3) a declaration that she is a permanent resident with the right of abode in Hong Kong under art. 24(2)(3).

296. *RA11 in HCAL81 of 1999 - Mr Chan Kei Yui* (who succeeds on the "legitimate expectation" issue):

(1) the appeal is allowed;

(2) the removal order made against him is quashed;

(3) the Director of Immigration is directed to consider the exercise of his discretions under ss. 11, 13 and 19(1) of the Immigration Ordinance in accordance with this judgment.

297. *RA13 in HCAL81 of 1999 - Mr Yuan Zhi Wei* (who succeeds on the "legitimate expectation" issue):

(1) the appeal is allowed;

(2) the removal order against him is quashed;

(3) the Director of Immigration is directed to consider the exercise of his discretions under ss. 11, 13 and 19(1) of the Immigration Ordinance in accordance with this judgment.

298. *Ms Li Shuk Fan in HCAL2 of 2000* (who succeeds on the "Concession" issue):

(1) the appeal is allowed;

(2) a declaration that she falls within the policy decision.

299. The appeals in respect of the other representative applicants are dismissed.

300. The parties are directed to consult together for the purposes of drawing up and submitting to the Court for approval a draft of formal orders to be made by the Court for disposing of these appeals in accordance with this judgment in respect of each of the representative applicants and of each person represented by them. In the event of disagreement, the parties should make written submissions to the Court and if necessary, apply for directions concerning the making of such written submissions.

301. There will be no order as to costs in these appeals. The applicants' own costs are to be taxed in accordance with the Legal Aid Regulations.

Mr Justice Bokhary PJ :

I. Index

302. My judgment is divided into eleven sections under the following sub-headings:-

II. Introduction

303. There are over 5,000 appellants before the Court. All of them came to Hong Kong from the Mainland. They invoke our constitution the Basic Law. Doing so, they lay claim to Hong Kong permanent resident status and therefore the right of abode here. Their circumstances differ in a number of respects. Those differences are material to some of the arguments advanced on their behalf.

III. Previous judgments unaffected

304. But they are all unquestionably in the same position in regard to their first argument. For reasons which will soon become apparent, I will call this the "previous judgments unaffected" argument. It was ably presented by Mr Geoffrey Robertson QC who appears for most of the

appellants, and adopted by Ms Gladys Li SC who appears for the rest of them. It was vigorously opposed by Mr Geoffrey Ma SC who appears for the respondent, the Director of Immigration. Before stating and addressing this argument, I must quote certain provisions of the Basic Law, and recount certain developments in our constitutional history.

305. Article 158 of the Basic Law is described by Prof. Yash Ghai in his book "Hong Kong's New Constitutional Order", 2nd ed. (1999) at p.195 as a "complex provision which itself raises several acute problems of interpretation". I will set art. 158 out in full. It reads:

> " The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.
>
> The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.
>
> The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.
>
> The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law."

306. In order to give proper effect to the second last sentence of the third paragraph of art. 158, it is necessary that the last sentence of that paragraph be read down to a certain extent. The question is: to what extent?

307. On 29 January 1999 the Court delivered its judgments in **Ng Ka Ling v. Director of Immigration** (1999) 2 HKCFAR 4 and **Chan Kam Nga v. Director of Immigration** (1999) 2 HKCFAR 82. These were the judgments involved in the interpretation made by the Standing Committee on 26 June 1999 ("the Interpretation"). The Basic Law provisions involved were arts 22 (4) and 24(2)(3). Article 22(4) reads:

> " For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region."

Article 24 sets out (in its second paragraph) the six categories of persons who shall be Hong Kong permanent residents. And (by its third paragraph) it confers the right of abode in Hong Kong on them. For the purposes of the present appeal, only the first three categories need be quoted. They are:

> "(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong

> Kong Special Administrative Region;
>
> (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
>
> (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)."

308. In so far as is material to the present appeal, the Court held in **Ng Ka Ling's** case that persons who were Hong Kong permanent residents by virtue of art. 24(2)(3) did not require approval under art. 22(4) in order to leave the Mainland for Hong Kong so as to exercise their right of abode here. But the Interpretation said that they needed exit approval even for that purpose. In **Chan Kam Nga's** case the Court held that where a child relied on art. 24(2)(3) to derive Hong Kong permanent resident status through at least one parent, it mattered not whether that parent acquired such status before that child's birth or thereafter. But the Interpretation said that it was necessary that the parent had acquired such status before the child's birth.

309. The Interpretation was not made upon a reference to the Standing Committee by the Court. It was made pursuant to a request by the Hong Kong Government, through the State Council, to the Standing Committee. But Mr Ma for the Director concedes, properly in my view, that the provision in art. 158 that "judgments previously rendered shall not be affected" applies to an interpretation made by the Standing Committee without a reference by the Court just as much as it does to an interpretation made by the Standing Committee upon a reference by the Court.

310. As I indicated earlier, all the appellants are in the same position as far as the "previous judgments unaffected" argument is concerned. This is so for the following reasons. By the time when the judgments in **Ng Ka Ling's** case and **Chan Kam Nga's** case were delivered, all the appellants were Chinese nationals born in the Mainland who had at least one parent who was a Hong Kong permanent resident within categories (1) or (2) of art. 24(2). So they all had Hong Kong permanent resident status under the Basic Law as interpreted by the Court in its judgments in those two cases. And, shortly stated, the effect of the "previous judgments unaffected" argument is that they all acquired Hong Kong permanent resident status under those two judgments which status is, by virtue of the last sentence of art. 158(3), unaffected by the Interpretation.

311. If the "previous judgments unaffected" argument is correct, then two consequences ensue. The first is that all the appellants are entitled to have it declared in their favour that they are Hong Kong permanent residents with the right of abode here. And the second is that any removal order made against any of them must be quashed.

312. The reason why such removal orders must be quashed is as follows. In **Ng Ka Ling's** case the Court said this (at p.36 F-H):

> " However, it does not follow that the entire scheme introduced by the No 3 Ordinance is unconstitutional. One must distinguish between a permanent resident who enjoys the right of abode on the one hand and a person *claiming* to be a permanent resident on the other hand. It is reasonable for the legislature to introduce a scheme which provides for verification of a person's *claim* to be a permanent resident. In our view, the scheme, apart from the requirement of the one-way permit, is constitutional as it cannot be said to go beyond verification. Therefore, the scheme is constitutional in requiring a claimant to apply for and obtain a certificate of entitlement from the Director and providing that his status as permanent resident can *only* be established by his holding such a certificate. Further, the provisions of the scheme whereby he must stay in the Mainland whilst applying for such a certificate and whilst appealing against any refusal of the Director to

> issue a certificate are also constitutional. He has a right to land as part of his right of abode as a permanent resident. But his *claim* to that status must first be verified."

313. In the present case, however, there is no dispute that by the time when the judgments in **Ng Ka Ling's** case and **Chan Kam Nga's** case were delivered, all the appellants were Chinese nationals born in the Mainland who had at least one parent who was a Hong Kong permanent resident within categories (1) or (2) of art. 24(2). So if the "previous judgments unaffected" argument is correct, then they would all be persons with Hong Kong permanent residents status and not merely persons claiming such status. In other words, their status would be established and would not be in any need of verification.

314. Having set the scene, I turn now to address the question of whether the "previous judgments unaffected" argument is correct.

315. The starting point is this. In the absence of a contrary Standing Committee interpretation (or an amendment of the Basic Law), the judgments in **Ng Ka Ling's** case and **Chan Kam Nga's** case would have stood as precedents which benefit everyone whose circumstances fit the law as stated in those judgments, no matter when their circumstances come to fit the law so stated. (When I refer to the law as stated in those judgments, I mean of course the law there stated on the "exit approval" and "time of birth" points). Once the Interpretation was issued, however, those judgments ceased to be precedents on those points. That is clearly the inexorable consequence of the Hong Kong courts' duty under art. 158 to follow Standing Committee interpretations when applying Basic Law provisions interpreted by the Standing Committee. At the same time, there can be no doubt that those abode-seekers who were named parties in those two cases are, despite the Interpretation, entitled to be dealt with according to the law as stated in those judgments. That is the inevitable consequence of the stipulation in art. 158 that judgments previously rendered shall not be affected by subsequent Standing Committee interpretations.

316. Between two obvious extremes there often lies a less obvious middle to be distributed in either one direction or the other. In the present context, those occupying such middle ground include persons whose circumstances existing prior to the Interpretation fit the law as stated in the judgments in **Ng Ka Ling's** case and **Chan Kam Nga's** case. These appellants are such persons. They could have joined in those cases.

317. What is meant by the word "judgments" in the last sentence of art. 158(3)?

318. I am aware that in **R v. Ireland** (1970) 44 ALJR 263 Sir Garfield Barwick CJ, in a judgment with which all the other members of the High Court of Australia agreed, said (at p.266 A) that in "a proper use of terms, the only judgment given by a court is the order it makes [and that the] reasons for judgment are not themselves judgments though they may furnish the court's reason for decision and thus form a precedent". But that was said in the course of discussing a statutory provision which mandated a single judgment of the court unless separate judgments were considered convenient. And it was said to explain the view (expressed at p.266 B) "that the reference in [that provision] to 'separate judgments' is not a technically accurate use of language [and] can only mean separate reasons for judgment".

319. As always, it is important to bear in mind the reminder famously given by the Earl of Halsbury LC in **Quinn v. Leathem** [1901] AC 495 at p.506. It is that "the generality of the expressions which may be found [in judicial pronouncements] are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found".

320. Indeed, the relevance of context was pointed out by Sir Garfield Barwick CJ himself in **Moller v. Roy** (1975) 49 ALJR 311 at p.312 D-F. He was dealing with a constitutional provision giving the High Court of Australia jurisdiction to hear appeals from "all judgments, decrees, orders and

sentences of ... the Supreme Court of any State". And he said that the words "judgments etc." there refer to the formal orders which the Supreme Court of any State may make, that being "the accepted meaning of the word 'judgment' *in such a context as the present*". (Emphasis supplied.)

321. I turn to **Australian Consolidated Press Ltd v. Uren** [1969] 1 AC 590, a somewhat unusual case, but an instructive one for present purposes. It was an appeal from the High Court of Australia to the Privy Council. The High Court of Australia had ordered a new trial, and there was no appeal against that. All that was challenged before the Privy Council was that part of the High Court of Australia's judgment which had held that the Australian courts ought not to follow the decision of the House of Lords in **Rookes v. Barnard** [1964] AC 1129 on the circumstances in which exemplary damages are recoverable. Nevertheless the Privy Council held that it had jurisdiction to hear the appeal under s.3 of the Judicial Committee Act 1833. That section provided for the reference to the Judicial Committee of the Privy Council of any appeal to "His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule, or order of any court, judge or judicial officer". In its advice delivered by Lord Morris of Borth-y-Gest, the Privy Council said that it did not feel any need on that occasion to define the scope of the word "determination", but nevertheless observed (at p.633 A) that the word "is a wide one". So is the word "judgment". And its meaning depends on its context.

322. As to context, it is of course to be borne in mind that when the Standing Committee makes an interpretation of any provision of the Basic Law, the Standing Committee is saying what that provision has meant ever since it first came into effect. That situation therefore bears some comparison with the situation which arises when the courts strike down a statutory provision as unconstitutional. When the courts do that, they are stating that the provision was null and void from the start. As to such a situation, the decision of the United States Supreme Court in **Chicot County Drainage District v. Baxter State Bank 308 US 371** (1939) is instructive. Delivering the judgment of the court, Hughes CJ said this at p.374:

> "The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, ? with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

323. Neither legislation (as Deane J observed in **University of Wollongong v. Metwally** (1984) 158 CLR 447 at p.478) nor judicial decision (as Lord Browne-Wilkinson observed in **Kleinwort Benson Ltd v. Lincoln City Council** [1999] 2 AC 349 at p.359 E) can "expunge the past or alter the facts of history".

324. There must be a good reason why art. 158 of the Basic Law provides that "judgments previously rendered shall not be affected" by subsequent Standing Committee interpretations. That reason is obviously the protection of crystallised rights. The context being a constitutional one, there is no warrant for treating such protection as narrow or dependent on technicalities. In **R v. Secretary of State for the Home Department, ex parte Shefki Gashi and Artan Gjoka** [2000] EWHC Admin 356 a technical argument was advanced to the effect that the court could not make a declaration at the instance of a respondent. Collins J said (in para. 6): "But the argument is a barren one since a formal declaration is unnecessary when the judgment makes clear what the judge's view of the law is." No narrow or technical meaning was assigned to the word "judgment" in that context. Nor should anything of the kind be done in the present context.

325. The **Ng Ka Ling** and **Chan Kam Nga** litigation was constitutional litigation about an entrenched right. In my view, the nature of constitutional litigation about an entrenched right is such that all the persons whose existing circumstances put them in the relevant position acquire crystallised rights under a favourable judgment. The rival arguments on this part of the case are as finely balanced as any I have encountered in all my years at the Bar and on the Bench. I respect the opposite view. But for my own part I feel unable to restrict art. 158's protection of crystallised rights to named parties only.

326. It is to be emphasised that the "previous judgments unaffected" argument could never be accepted if it left the Interpretation with little effect or if it in any way questioned what is plainly beyond question, namely the undoubted authority of the Standing Committee. So does the argument do anything of that kind? I am satisfied that it does not. It applies only to crystallised rights. It does not involve the **Ng Ka Ling** and **Chan Kam Nga** judgments operating as precedents. The Interpretation has removed the precedential effect of those judgments. The "previous judgments unaffected" argument does not question that.

327. For all the foregoing reasons, I accept the appellants' "previous judgment unaffected" argument, and hold as follows. Any person whose circumstances existing prior to the Interpretation fit the law as stated in **Ng Ka Ling's** case and **Chan Kam Nga's** case acquired crystallised Hong Kong permanent resident status under the judgments in those two cases. Such status is, by virtue of the "previous judgments unaffected" provision in art. 158 of the Basic Law, unaffected by the Interpretation. Each appellant is such a person.

328. Accordingly I would allow these appeals so as to: (i) declare that all the appellants are Hong Kong permanent residents with the right of abode here; and (ii) quash any removal order made against any of them.

329. That would be dispositive of these appeals if it were accepted by at least a majority of the Court. Since it is not, I turn now to the appellants' argument on legitimate expectations.

IV. Relief against abuse of power/legitimate expectations: introduction

330. The essential function of the doctrine commonly called "the doctrine of legitimate expectation" is to give judicial relief against abuse of executive power. If one were to name this doctrine after its raison d'être, it could be called "the doctrine against abuse of power". But it has been named after the thing which it would be an abuse of power to ignore. And I will call it by that name.

331. Shortly stated, the appellants' "legitimate expectation" argument is:

> (i) that they have a legitimate expectation of being treated, at least as far as possible under the Director's discretionary powers, in the same way as the abode-seekers who were named parties in *Ng Ka Ling's* case and *Chan Kam Nga's* case;
>
> (ii) that it is an abuse of executive power not to treat them in that way; and
>
> (iii) that the courts should grant them relief against such abuse of executive power.

The width and depth of the Director's opposition to this argument calls for a commensurately full examination of the relevant law. There are several points to be clarified for the disposal of the present appeals and for the subsequent approach to the legitimate expectation claims involved.

332. As a common law institution, the doctrine of legitimate expectation found its origin and nurture in a principled and practical response to the needs of actual cases. A "significant strength of the common law", Lord Alexander of Weedon QC points out with typical completeness and concision in

"The Voice of the People (1997) at p.46, "is that it develops rights and duties in real situations". The doctrine of legitimate expectation involves a duty owed by those who govern to those who are governed. It was developed by the courts as a further means of upholding the rule of law by ensuring that executive powers are used and not abused. Upon examination, the courts' efforts can generally be seen to bear the hallmarks of the approach championed by Sir Thomas More in "Utopia", Book One (1516) where (I take it from the Paul Turner translation of 1965 at p.63) he counselled "a more civilized form of philosophy which knows the dramatic context, so to speak, tries to fit in with it, and plays an appropriate part in the current performance". For the courts have generally endeavoured, as they should, to mould the doctrine of legitimate expectation so as to preserve the separation of powers and avoid any dislocation of the constitutional arrangements by which executive policy is left to the executive.

333. Prof. Dawn Oliver (in her commentary "A negative aspect to legitimate expectations" [1998] PL Winter 558 at p.562) explains that:

> "The English common law of legitimate expectations has developed so as to create additional public law benefits to which a person would not otherwise be entitled, rather than being prerequisites for the enjoyment of existing civil rights: one does not need to show both a right and a legitimate expectation that one will be entitled to enjoy it in order to succeed in a civil action ..."

Thus in **R v. Devon County Council, ex parte Baker** [1995] 1 All ER 73 at p.89e Simon Brown LJ spoke of "those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice". It should of course be remembered that, as pointed out in "Wade & Forsyth on Administrative Law", 8th ed. (2000) at p.496: persons are elementarily entitled to be treated fairly even where no specific promise has been made and no established practice exists; and the "doctrine of legitimate expectation ... enhances but does not replace the duty to act fairly".

334. Dr Yvonne Cripps points out in her article "Some Effects of European Law on English Administrative Law" (1994) 2 Indiana Journal of Global Legal Studies 213 at p.222 that "legitimate expectations are recognized in the domestic law of some European nations, notably Germany". Where the concept originated is not a matter on which I have made any study. Such a study would not be an easy endeavour. It is said in "Norbert Rouland: Legal Anthropology" (1988) (translated into English in 1994) at p.1 that: "There are of the order of 10,000 distinct known legal systems [although] we have relatively precise information about only several hundred of them". As far as the common law of England is concerned, the first glimmer of the doctrine of legitimate expectation as such was seen in 1969. This was in the case of **Schmidt v. Secretary of State for Home Affairs** [1969] 2 Ch. 149. Lord Denning MR said (at p.171 A-B) that where an alien had been given permission to stay in the country for a specified period and the authorities then contemplated revoking such permission before such period expired, the alien ought to be "given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted period". That was how the courts came to accord *procedural* enforcement of legitimate expectations. Since then the doctrine has evolved so as to include *substantive* enforcement of legitimate expectations.

335. Each form of enforcement arises out of situations in which the executive has led a person legitimately to expect that it would let him keep something or that it would give him something. Both are grounded in the rule of law. As Lord Steyn said in **R v. Secretary of State for the Home Department, ex parte Pierson** [1998] AC 539 at p.591 E, "the rule of law enforces minimum standards of fairness, both substantive and procedural". Procedural enforcement involves the courts requiring the executive to give a person an opportunity to be heard before making a decision which might affect him. It may arise because he has been induced legitimately to expect an opportunity to be heard before a decision is made. Or it may arise because he has been induced legitimately to

expect that he would be allowed to keep or be given the thing of substance which the decision may take away, diminish or withold. Substantive enforcement involves the courts requiring the executive to refrain from taking away, diminishing or witholding a substantive thing legitimately expected.

336. In **R v. Secretary of State for Home Affairs, ex parte Hargreaves** [1997] 1 WLR 906 the English Court of Appeal (i) denied that the substance of a decision could be impeached on the grounds that it unfairly disappointed a legitimate expectation; and (ii) sought to confine such a challenge to *Wednesbury* grounds. The opposite approach adopted by Sedley J (as Sedley LJ then was) in **R v. Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd** [1995] 2 All ER 714 was treated none too gently by the Court of Appeal in **Hargreaves's** case. But Sedley J's approach has since gained acceptance.

337. As it seems to me, substantive enforcement ought not to be viewed with suspicion or applied parsimoniously. For it is a natural development from procedural enforcement. After all, the legitimate expectation itself will always be substantive except where the representation itself is no more than that the person will be given an opportunity to be heard. And even then the ultimate objective would still be substantive. An opportunity to be heard is only a means of attaining that objective. As Lord Denning MR observed in the passage which I have quoted from his judgment in **Schmidt's** case at 171 A-B, what the alien would legitimately expect is to be allowed to stay for the permitted period. An opportunity to be heard would only be a means of avoiding the revocation of such permission. The merit of the substantive unfairness ground" ? the President of the Court of Appeal of New Zealand (as Lord Cooke of Thorndon then was) observed in **Thames Valley Electric Power Board v. NZFP Pulp & Paper Ltd** [1994] 2 NZLR 641 at p.653 ? "is that it allows a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked". As I see it, substantive enforcement of legitimate expectations is a remedy which occupies an important place in the armamentarium of a public law system like ours.

338. A prime example, if not *the* prime example, of substantive enforcement is to be found in the 1999 decision of the English Court of Appeal in **R v. North and East Devon Health Authority, ex parte Coughlan** [2001] 1 QB 213. But the availability of such relief had been recognised as long ago as 1985 by the House of Lords in **R v. Inland Revenue Commissioners, ex parte Preston** [1985] AC 835.

339. In **Preston's** case the taxpayer applied for judicial review of the Inland Revenue Commissioner's decision to initiate action under Part XVII of the Income and Corporation Taxes Act 1970 in order to re-open their assessments of his tax liability for the years 1974-75 and 1975-76. He alleged that they had represented to him that they would not re-open those assessments if he withdrew his claims for interest relief and capital loss for those years. There was no dispute that he did withdraw those claims. The issue was whether that representation had been made. And it is clear from Lord Templeman's speech, with which the other Law Lords agreed, that the taxpayer failed only because their Lordships were of the view that no such representation had in fact been made. Lord Scarman said in terms (at p.853 A) that if the taxpayer had managed to establish that such a representation had been made, "he would have been entitled to relief by way of judicial review for unfairness amounting to abuse of the power to initiate action under Part XVII of the Act of 1970".

340. In the 7th (1994) edition of "Wade & Forsyth on Administrative Law" **Preston's** case was referred to by the learned authors in the course of noting (at p.419) that the doctrine of legitimate expectation was "proving to be a source of substantive as well as of procedural rights". In the latest (8th (2000)) edition of the same work it is stated (at pp 494-495) that the doctrine of legitimate expectation "has been developed, both in the context of reasonableness ... and in the context of natural justice".

341. The judicial review applicant in **Coughlan's** case was a severely disabled person who was housed at Mardon House, a National Health Service ("NHS") facility for the long-term disabled. The

health authority's predecessor had promised Miss Coughlan and other Mardon House residents that Mardon House would be their home for life. This was followed by a policy decision on the eligibility criteria for long-term NHS care. The effect of this decision was that specialist nursing services should be provided by the NHS while general nursing care should be for local authorities to purchase. Next, the health authority decided that Miss Coughlan and other Mardon House residents did not meet such criteria. Finally, following public consultation, the health authority decided to close Mardon House and to transfer the long-term general nursing care of Miss Coughlan and other Mardon House residents to the local authority, although no alternative placement for them was identified.

342. Hidden J quashed the health authority's decision to close Mardon House, and his judgment was affirmed on appeal. The Court of Appeal said (at p.260 E-G) that the decision to close Mardon House was unlawful on, among other grounds, the ground that:

> "... the decision was an unjustified breach of a clear promise given by the health authority's predecessor to Miss Coughlan that she should have a home for life at Mardon House [and] constituted unfairness amounting to an abuse of power by the health authority."

343. **Coughlan's** case was, if I may say so, decided by a particularly strong public law panel (consisting of Lord Woolf MR, as the present Lord Chief Justice then was, and Mummery and Sedley LJJ). It was referred to without disapproval by Lord Hoffmann in **R v. Ministry of Defence, ex parte Walker** [2000] 1 WLR 806 at p.816 B. What is particularly interesting is how it was dealt with in **R v. Secretary of State for the Home Department, ex parte Hindley** [2001] 1 AC 410 where Lord Steyn (with whose speech Lords Browne-Wilkinson, Nicholls of Birkenhead and Hutton agreed) said this at p.419 A-B:

> "Counsel for Hindley relied on the doctrine of substantive legitimate expectations, as explained in *R v. North East Devon Health Authority, Ex p Coughlan* [2001] QB 213. There are dicta in *In re Findlay* [1985] AC 318 which appear to run counter to counsel's argument on substantive legitimate expectations. Counsel invited the House to hold that *In re Findlay* is distinguishable or, alternatively, that it was wrongly decided. Counsel for the Secretary of State has however persuaded me that on the facts of this case these legal issues do not arise for decision."

It will be observed that no question of overruling **Coughlan's** case (as opposed to distinguishing or not following **Findlay's** case) was even mentioned. And (at p.421 G) the fifth Law Lord in **Hindley's** case, Lord Hobhouse of Woodborough, described the judgment in **Coughlan's** case as "valuable".

344. Providing judicial relief against abuse of executive power without cramping the proper exercise of such power is an important concern of the courts in legitimate expectation cases. But this concern is neither novel nor confined to legitimate expectation cases. **In HTV Ltd v. Price Commission** [1976] ICR 170 (concerning exchequer levy) Lord Denning MR said this at p.185 G:

> "It has been often said, I know, that a public body, which is entrusted by Parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers: and it is a misuse of power for it to act unfairly or unjustly towards a private citizen when there is no overriding public interest to warrant it."

The Master of the Rolls then cited (at pp 185 H-186 B) four cases in which the courts prevented the executive from resiling without good reason from what it had said or done. These four cases are:

Robertson v. Minister of Pensions [1949] 1 KB 227 (concerning a pension); **Wells v. Minister of Housing and Local Government** [1967] 1 WLR 1000 (concerning planning permission); **Lever Finance Ltd v. Westminster (City) London Borough Council** [1971] 1 QB 222 (also concerning planning permission); and **Congreve v. Home Office** [1976] 1 QB 629 (concerning a television licence). In the pension and planning permission cases there had been detrimental reliance (a topic about which I will say more in due course). But the television licence case simply involved the question of whether a television licence could be revoked without giving reasons or for no good reason.

345. The House of Lords' decision in **Findlay's** case illustrates the executive's need to be able to alter its policy in the light of the public interest as it sees that interest. But that is not to say that such need precludes even a limited restriction being placed on that ability where such a restriction is necessary for the purpose of preventing an abuse of power. After all, such a restriction would only materialise if the balance to be struck between fairness to the holder of a legitimate expectation and the wider interests relied upon to override it comes down in favour of the former. And the scales will be held by an independent and impartial judiciary. Judges, as Prof. M.J. Detmold puts it in "The Nature of Judicial Power" (2001)12 PLR 135 at p.135, "rule by law and nothing else."

346. It is also to be remembered that just because a case involves an executive policy matter, it does not mean that the policy concerned is being attacked root and branch. A good illustration of this is to be found in **R v. Ministry of Defence, ex parte Smith** [1996] QB 517. There the judicial review applicants were discharged from the armed forces on the sole ground that they were of homosexual orientation. They challenged the decisions to discharge them and the executive policy on which those decisions were based. They argued that those decisions and that policy were irrational, incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and in breach of a European Community Council directive on equal treatment. There was no challenge to the executive policy concerned insofar as it involved the public interest in an operationally efficient and effective fighting force. The real question was, Simon Brown LJ said: "is it reasonable for the Secretary of State to take the view that allowing homosexuals into the forces would imperil that interest? Is that, in short, a coherent view, right or wrong?" (As it happens, the applicants failed in the domestic courts but eventually succeed in the European Court of Human Rights which held, in **Smith and Grady v. United Kingdom** (2000) 29 EHRR 493 and **Lustig-Prean and Beckett v. United Kingdom** (2000) 29 EHRR 548, that the ban on homosexuals in the armed forces breached their Convention rights.)

347. Whether they are enforcing legitimate expectations procedurally or substantively, the courts are acting to accord fairness. And even as fairness requires that a legitimate expectation be duly taken into account during the process of reaching a decision, so might it sometimes dictate the result of that process. The most significant difference is this. It is when they enforce legitimate expectations substantively (rather than merely procedurally) that the courts must take particular care to avoid trespassing upon the policy preserve of the executive. This care is, in my view, to be reflected in the standard of review to be applied by the courts when judicially reviewing an administrative decision which disappoints a legitimate expectation. But such care does not, in my view, call for any predisposition against finding that a legitimate expectation exists. Nor, in my view, does it call for any reluctance to require a reconsideration if a legitimate expectation has been left out of *account.*

V. Eighteen points on legitimate expectations

348. My examination of the law includes an endeavour to comprehend its past and detect its trend. But even when endeavouring to do those things, I am of course engaged in ascertaining the present state of the law. As Mr Justice Holmes explained on the very first page of "The Common Law" (1881): "In order to know what [the law] is, we must know what it has been, and what it tends to become." With each element put in context, the doctrine of legitimate expectation appears to include the following eighteen points consisting of propositions, rationale and room for

development:-

349. *One* The separation of powers means that the making, un-making, re-making and carrying out of executive policy are matters for the executive. At the same time, the rule of law places the courts under a duty to ensure that people's legitimate expectations induced by the executive receive due respect from the executive. This is because such respect is a part of the law as an important feature of the constitutional relationship between the government and the people. As Lord Mustill observed in **R v. Secretary of State for the Home Department, ex parte Fire Brigades Union** [1995] 2 AC 513 at p.567 E-G when discussing the separation of powers, the courts do not govern but they do protect people against misuse of executive powers. Protection against such misuse or abuse is reason enough for the doctrine of legitimate expectation. But the doctrine is by no means to be seen as slanted against the executive. There is another reason for it. As the executive itself would probably be the first to recognise, it surely facilitates the task of governance that people feel able to put their faith in what their government says and does.

350. *Two* Suppose the executive induces a person legitimately to expect that he would be given an opportunity to be heard before a decision which might affect him is made, but then disappoints that expectation. If so, the courts will in the normal way enforce that procedural expectation. If no decision has yet been made, the courts can consider declaring that no decision should be made until after the person has had an opportunity to be heard. If a decision adverse to the person has been made without his having had an opportunity to be heard, the courts may quash the decision for the decision-maker to make a fresh decision after the person has had an opportunity to be heard. This was the course taken by the Privy Council in **Attorney-General v. Ng Yuen Shiu** [1983] 2 AC 629. Delivering their Lordships' advice, Lord Fraser of Tullybelton referred (at p.638 F-G) to "the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflic*t with its duty"*.

351. Three Suppose the executive induces a person legitimately to expect that it would give him, or let him keep, something of substance. If so, the executive should not withold, take away, or diminish that thing without taking that substantive expectation duly into account. This is the foundation for substantive enforcement of a legitimate expectation. Where an administrative decision-maker disappoints a substantive expectation without taking it into account, the courts will in the normal way quash his decision for him to make a fresh decision with the expectation duly taken into account (as the English Court of Appeal did in **R v. London Borough of Newham, ex parte Bibi** [2001] EWCA Civ 607). Where an administrative decision-maker disappoints a substantive expectation after taking it into account (whether initially or upon a fresh consideration) then the courts will have to decide, upon the appropriate standard of review, whether or not to accord substantive enforcement of the expectation. In **Coughlan's** case it was accorded.

352. *Four* The expression "in the normal way" is used in points two and three because the things said there are subject to exceptions arising out of inevitability. Inevitability works both ways. First, if it can be seen ? as it might in an extreme case ? that an end result adverse to the holder of the expectation is inevitable even if due account is taken of the expectation, then the courts, which do not act in vain, will not quash an administrative decision just because the maker has left the expectation out of account. But an end result adverse to the holder of the expectation will not be assumed unless the court feels sure: (i) that the administrative decision-maker will reach that result even after taking the expectation duly into account; and (ii) that any administrative appeal against, and any judicial review challenge to, his decision is doomed to failure. This is the inevitability test laid down by the Privy Council in **Nguyen Tuan Cuong v. Director of Immigration** [1997] 1 WLR 68 at p.77 B.

353. *Five* The other and opposite way in which inevitability can operate is as follows. Suppose an administrative decision-maker decides against the holder of a substantive expectation without taking the expectation into account. And suppose the court feels sure that once the expectation is duly taken

into account an end result favourable to the holder of the expectation will be reached by the administrative decision-maker or, failing that, by an administrative appeal tribunal or by the courts. If so, the court will of course quash the administrative decision. The court having done that, I do not think that it would be bound to follow the circuitous course of leaving it to the administrative decision-maker to make a fresh decision, knowing that it will undoubtedly intervene again if he or an administrative appeal tribunal were to decide in any way other than favourably to the holder of the expectation. That would cause pointless delay. It would also be to insist that the administrative decision-maker assume the undignified role of a rubber stamp. In my view, the courts would be entitled, in the extreme circumstances postulated, to proceed directly to substantive enforcement: for example by an appropriate declaration.

354. *Six* It can happen, as Lord Diplock pointed out in **Hughes v. Department of Health and Social Security** [1985] AC 776 at p.788 A-C, that a legitimate expectation had come to an end before the administrative decision in question. If so, it provides no basis for challenging that decision. But it hardly needs to be said that the consequences of a legitimate expectation are not erased simply by the fact of a decision which disappoints it. As it is put in "de Smith, Woolf & Jowell on Judicial Review of Administrative Action", 5th ed. (1995) at p.575, para. 13-035: "Although free to alter its policy, the authority is by no means free *to ignore the existence of a legitimate expectation".*

355. Seven As to knowledge, the point is made in "de Smith, Woolf & Jowell on Judicial Review of Administrative Action" 5th ed (1995) at p.426, para 8-058 that if a person is in the class to which a representation is directed, the fact that he was unaware of it until after the decision disappointing it was made ought not to deprive him of the benefit of the representation. I agree. In **Minister for Immigration and Ethnic Affairs v. Teoh** (1995) 183 CLR 273 the High Court of Australia held that the ratification of a treaty gives rise to a legitimate expectation that the executive would act in conformity with it. Mason CJ and Deane J said at p.291: "It is not necessary that a person seeking to set up such legitimate expectation should be aware of the [treaty] or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it". Similarly, Toohey J said (at p.301) that "legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned. The matter is assessed objectively ...". I am aware that it is said in "Wade & Forsyth on Administrative Law", 8th ed (2000) at p.496: "If a person did not expect anything, then there is nothing that the doctrine of legitimate expectation can protect. So a person unaware of an undertaking made by a public authority, cannot expect compliance with that undertaking". But I do not read that as being directed to class representations like the ones in **Teoh's** case and the present case. A person is not to be denied enforcement of a legitimate expectation of his class merely because he only learned of it after a decision disappointing it.

356. *Eight* On the other side of the same coin, there is this point made in "de Smith, Woolf & Jowell on Judicial Review of Administrative Action", 5th ed. (1995) in a footnote to the "class representation" point made at p.426, para 8-058 referred to above: "Correspondingly, a legitimate expectation may be revoked by a changed circular properly communicated, though not necessarily known to the applicant". As presently advised, I am inclined to think that this must be so. That would still leave the question of what amounts to proper communication.

357. *Nine* Legitimate expectations may be induced by: express representations (as in **Attorney-General of Hong Kong v. Ng Yuen Shiu**); implied representations (as rightly said in **R v. Gaming Board, ex parte Kingsley** [1996] COD 241 at p.242); or established practice (as in **R v. Birmingham City Council, ex parte Dredger** [1993] COD 340).

358. *Ten* The case for enforcing a legitimate expectation is particularly strong where a person has altered his position in reliance on that legitimate expectation so that he would suffer detriment if such expectation is not fulfilled. But detrimental reliance is not generally essential. "Particularly if he relied on it" is how Bingham LJ (as Lord Bingham of Cornhill then was) put it in **R v. Inland**

Revenue Commissioners ex parte MFK Underwriting Agencies Ltd [1990] 1 WLR 1545 at p.1569 H. Attention is drawn in "de Smith, Woolf & Jowell's Principles of Judicial Review" (1999) at p.306, footnote 41 to **R v. Secretary of State for the Home Department, ex parte Asif Mahmood Khan** [1984] 1 WLR 1337, **Attorney-General v. Ng Yuen Shiu and R v. Secretary of State for the Home Department, ex parte Ruddock** [1987] 1 WLR 1482 as "important cases [in which] a legitimate expectation has been found in the absence of detrimental reliance".

359. *Eleven* Although detrimental reliance is not generally essential, there can be exceptional situations in which success on legitimate expectation grounds requires detrimental reliance. Such a situation arose in **R v. Secretary of State for Education and Employment, ex parte Begbie** [2000] 1 WLR 1115. There the government's policy was misrepresented through incompetence. The mistake was corrected after about five weeks. Laws LJ identified the issue as whether the correction was an abuse of power. And he held as follows (at p.1131 F-G):

> " If there had been reliance and detriment in consequence, I would have been prepared to hold that it would be abusive for the Secretary of State not to make the earlier representations good. But there has not. Bitter disappointment, certainly; but I cannot see that this, though it excites one's strongest sympathy, is enough to elevate the Secretary of State's correction of his error into an abuse of power. We do not sit here to punish public authorities for incompetence, though incompetence may most certainly sometimes have effects in public law."

So **Begbie's** case is one in which the executive made a mistake in communicating its policy and then quickly corrected that mistake. And it was held that correcting that mistake did not, in the circumstances of that case, amount to an abuse of power. As McMullin VP said in giving the judgment of the Court of Appeal in **Chu Piu Wing v. Attorney General** [1984] HKLR 411 at pp 417J-418A, "there is a clear public interest to be observed in holding officials of the State to promises made by them *in full understanding of what is entailed by the bargain*". (Emphasis supplied.) This passage was quoted with approval by Lord Griffiths in **R v. Horseferry Road Magistrates' Court, ex parte Bennett** [1994] 1 AC 42 at p.61 E-F. The Vice-President's words which I have italicised serve to illustrate the exceptional nature of "mistake and quick correction" cases like **Begbie's** case.

360. *Twelve* To be legitimate an expectation must be reasonable. That is how I understand what the Privy Council said in **Attorney-General of Hong Kong v. Ng Yuen Shiu** at p.636 E. What is reasonable depends on the circumstances. Bingham LJ said this in the **MFK Underwriting Agents** case (at p.1570 A-B): "Nor, I think, on facts such as the present, would it be fair to hold the revenue bound by anything less than a clear, unambiguous and unqualified representation". Much the same thing was said by the Divisional Court in **R v. Jockey Club, ex parte RAM Racecourses Ltd** [1993] 2 All ER 225. I think that it can safely be laid down as a proposition of general application that a representation must be unambiguous and unqualified if it is to give rise to a legitimate expectation. But where representations are addressed to a wide audience including some quite unsophisticated persons, the courts should not be astute to find ambiguity or qualification. With fairness as the touchstone, the courts should then look at the real impact of the representation.

361. *Thirteen* Candour is required of persons who seek to rely on legitimate expectations. In the **MFK Underwriting Agents** case Bingham LJ said at p.1569 D-E that putting "all his cards face upwards on the table" was one of the conditions which a taxpayer has ordinarily to fulfil before he can successfully argue that, as a result of an approach, the revenue has agreed to forgo, or has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation". In **R v. Inland Revenue Commissioners, ex parte Matrix-Securities Ltd** [1994] 1 WLR 334 Lord Jauncey of Tullichettle said (at p.352 F) that he had no doubt that that statement by Bingham LJ was absolutely correct. I, too, am sure of its correctness. And even unsophisticated persons must be candid. But in judging whether or not they have been candid, their

lack of sophistication should in all fairness to them be borne in mind.

362. *Fourteen* Normally it is when the courts are asked to accord substantive enforcement of a legitimate expectation that the question of the appropriate standard of review, and the factors relevant thereto, arises.

363. *Fifteen* But that question can arise even when the courts are asked to accord procedural enforcement of a legitimate expectation. An example of this was given by the Court of Appeal in **Coughlan's** case when it said (at p.247 A) that even where the application of the doctrine of legitimate expectation "reflects procedural expectations, for example concerning consultation, it may be affected by an overriding public interest." That was what happened in **Council of Civil Service Unions v. Minister for the Civil Service** [1985] AC 374. There the House of Lords held that the civil servants concerned had a legitimate expectation that they would be consulted before a decision was made on whether or not to take away their trade union rights and that, but for national security, the minister would have been under a duty to consult them.

364. *Sixteen* To the extent that a legitimate expectation gives rise to a duty enforceable at the instance of the holder, legitimate expectations resemble rights. This resemblance is appropriate to the role which legitimate expectations play in preserving the rule of law. The practical difference between legitimate expectations and rights is that a legitimate expectation, unlike a right, can be made to give way to what the executive manages to justify as an overriding public interest. This practical difference dovetails with the conceptual difference involved. As pointed out in "Lloyd's Introduction to Jurisprudence", 6th ed (1994) at p.392, although "every right in the strict sense implies the exisitence of a correlative duty, not every duty implies a correlative right". A person's entitlement under a legitimate expectation is not correlative to the executive's duty thereunder. For, as the separation of powers requires, not performing the duty otherwise owed under a legitimate expectation can be justified by an overriding public interest in its non-performance. This is material to the standard which the courts ought to apply when reviewing an administrative decision which disappoints a legitimate expectation. Just as the standard of review must not ossify executive policy to the detriment of effective governance, so must it not license abuse of power by making it too easy for the government to go back on its representations.

365. *Seventeen* Whatever standard of review is applied, the law should insist that public authorities always act in a high-principled way and with scrupulous fairness in their dealings with the public. And that should be required of public authorities even in situations where something less may be tolerated in dealings between members of the public among themselves. This approach, the English Court of Appeal said in the legitimate expectation case of **R v. Inland Revenue Commissioners, ex parte Unilever Plc** [1996] COD 421 at p.423, is exemplified in the decisions of the House of Lords in the restitution cases of **R v. Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd** [1988] 1 AC 858 and **Woolwich Equitable Building Society v. Inland Revenue Commissioners** [1993] AC 70.

366. *Eighteen* As for the standard to be applied by the courts when reviewing an administrative decision which disappoints a legitimate expectation even after taking it into account (whether initially or upon a reconsideration), the law remains to be settled. Various options, either across the board or depending on the nature of the case, have been proposed in the decided cases and academic writings. These options include the following (helpfully discussed in Craig and Schonberg, "Substantive Legitimate Expectations after **Coughlan**" [2000] PL Winter 684 at pp 698-700):

(a) reviewing abuse of power in and of itself;

(b) reviewing traditional *Wednesbury* unreasonableness (where, under the test laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 KB 223 at pp 230 and 234, an administrative decision is to be impugned only if

it is "so unreasonable that no reasonable authority could ever have come to it");

(c) reviewing *Wednesbury* unreasonableness as reformulated in the manner suggested by Lord Cooke of Thorndon in *R v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 2 AC 418 at p.452 E (where the test would be the less restrictive one of "whether the decision in question was one which a reasonable authority could reach");

(d) reviewing disproportionality; or

(e) reviewing imbalance between fairness to the person having a legitimate expectation and the overriding interests relied upon by the executive to justify disappointing that expectation.

Very worthy of note, too, is the proposition advanced in Elliott, "Human Rights and Substantive Review" [2001] CLJ 301 at p.322 that "the reasonableness and proportionality principles can co-exist and that they serve complementary purposes by supplying the doctrinal means by which the standard of substantive review may be tailored to the constitutional and institutional demands of specific fact situations".

VI. Standard of review where legitimate expectations are disappointed

367. At this stage of the present litigation, it is not necessary finally to decide the standard of review. This is because the Director has not yet taken legitimate expectations into account. Should the time come when any decision he makes after taking legitimate expectations into account is challenged, then the standard of review will have to be decided. But even at this stage it is not merely desirable at least to consider what the appropriate standard may be. It is necessary to do so. For what the standard may be is relevant to the Director's alternative argument that even if a legitimate expectation has arisen, it is inevitable that the appellants will ultimately fail on legitimate expectations even after the same have been taken into account.

368. It may well be possible ? to a certain extent at any rate ? to reconcile and assimilate the various standards of review which have been proposed. As it seems to me, the one constant is that the constitutional foundation of such review is always formed by the rule of law, the dictates of fairness and the duty of the courts to provide judicial relief against abuse of executive power. The political dimension of executive policy is never any concern of the courts. But complaints of illegality made against any such policy is for the courts to resolve and, if made out, to redress. While the judiciary will never assume executive powers, it will ? even to the extent of enforcing legitimate expectations substantively ? grant relief against executive acts or omissions which constitute an abuse of power and are therefore unlawful. All of this must be accommodated within the standard of review.

369. If *Wednesbury* unreasonableness is to be the standard of review, then I think that Lord Cooke of Thorndon's reformulation is to be preferred to Lord Greene MR's original formulation. On that footing, if a decision-maker exercises his power in such a way as to disappoint a legitimate expectation, then whether he has abused his power would depend on whether his decision is one which a reasonable decision-maker could reach. That might depend on whether the court thinks that the challenged decision is proportionate. And that might in turn depend on what the court considers to be an acceptable balance to strike between the requirements of fairness to the holder of the substantive legitimate expectation and any wider interests relied upon by the executive to override that expectation and therefore justify disappointing it.

370. Moreover, where human rights are engaged there can be such a thing as (in the words of Simon Brown LJ in **Reg v. Ministry of Defence, ex parte Smith** at p.540 E) "the conventional *Wednesbury* basis adapted to a human rights context". I am by no means committed to the *Wednesbury* test. In

particular, I am mindful of Lord Cooke of Thorndon's caveat in **R (Daly) v. Secretary of State for the Home Department** [2001] 2 AC 532 at p.549 C that: "It may well be ... that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd". My purpose in discussing the *Wednesbury* test is to pave, or at least leave open, the way for its reformulation and adaptation as may be appropriate in the event of it being applied.

371. A valuable contribution to the discourse on how this area of the law may develop is made by Prof. Jeffrey Jowell QC in his article "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL Winter 671 at p.682 where he says:

> " Under the new constitutional litigation the courts ask essentially two questions. First, is there a breach of fundamental democratic right? If the answer to that question is in the affirmative, the second question asks whether the decision, which appears on its face to subvert democracy, is in fact necessary to preserve it in the interest of a legitimate countervailing democratic value. In assessing these questions the courts will look to the process of justification of the decision and to the inherent qualities of a democratic society. This kind of review of the constitutional co-ordinates of the decision is a far cry from review on the basis of the desirability of the decision in abstract terms."

372. I do not envisage it proving at all easy wholly to avoid uncertainty while at the same time preserving the flexibility needed to accommodate the range of circumstances likely to be encountered in case after case. But whatever the difficulty, the appropriate standard or standards of review will have to be worked out in actual cases by the judges ? considerably assisted, I venture to predict, by the writings of the academic lawyers who are giving their close attention to this important and evolving branch of the law. Perhaps ? and I raise this no more than tentatively ? the solution lies in adopting the by no means unprecedented course of laying down a usual standard from which departures are permissible in special circumstances. There would remain uncertainty over what would constitute special circumstances. But such uncertainty would hopefully abate as case after case is decided.

373. Having regard to the very important role which the doctrine of legitimate expectation plays in the preservation of the rule of law, the standard of review in legitimate expectation cases ought always to be intense. And it ought to be particularly intense in a case like the present one where the legitimate expectation concerned is in respect of an entrenched constitutional right such as the right of abode. The point is, if I may say so, will put in "T.R.S. Allan: Constitutional Justice" (2001) at p.131 where, in the course of discussing substantive legitimate expectations, the learned author says: "Where important constitutional rights are at stake, the boundaries of rationality are naturally drawn more tightly, the extent of judicial deference to administrative expertise and convenience being reduced accordingly". **Daly's** case is instructive in this connection. It concerned a prisoner's right (under art. 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as set out in Schedule 1 to the Human Rights Act 1998) to respect for his correspondence. The following points emerge from Lord Steyn's speech (reported at pp 546-548). As the litigation (first in London then in Strasbourg) over the ban on homosexuals in the British armed forces showed, the differences in approach between the traditional grounds of judicial review and the proportionality approach may sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. And it is possible to do so without a shift to "merits review" or any erosion of the fundamental distinction between the role of judges and the role of administrators.

374. In my view, what is true of convention rights is true of Basic Law rights.

VII. Test cases and legitimate expectations

375. Mr Robertson submits that the appellants' case on legitimate expectations is strengthened, if it needs strengthening, by the test case nature of **Ng Ka Ling's** case and **Chan Kam Nga's** case.

376. Delivering the judgment of the Court in **Ng Ka Ling's** case, the Chief Justice said (at p.23 J): "These are test cases". In the judgment which I gave in **Chan Kam Nga's** case, with which all the other members of the Court agreed, I said (at p.87 E) that how the "time of birth" question was answered would affect not only the named abode-seekers in that case but also "many other persons now and in the future". The reference to "now" (as opposed to "in the future") pertains to persons whose circumstances fit the law as stated in those two test cases at the time when the Court decided them.

377. The effect of judgments given in test cases in the field of public law was discussed by the English Court of Appeal in **R v. Hertfordshire County Council, ex parte Cheung** "The Times" 4 April 1986 and very recently in **R v. Secretary of State for the Home Department, ex parte Zequiri** [2001] EWCA Civ 342.

378. At p.10 (of the full transcript rather than the abbreviated report in "The Times") Sir John (later Lord) Donaldson MR said this in **Cheung's** case:

> "... if a test case is in progress in the public law court, others who are in a similar position to the parties should not be expected themselves to begin proceedings in order to protect their positions. I say this for two reasons. First, it would strain the resources of the public law court to breaking point. Second, and perhaps more important, it is a cardinal principle of good public administration that all persons who are in a similar position shall be treated similarly. Accordingly, it could be assumed that the result of the test case would be applied to them by the authorities concerned without the need for proceedings and that, if this did not in the event occur, the court would regard this as a complete justification for a late application for judicial review."

379. In **Zequiri's** case at para. 43 Lord Phillips of Worth Matravers MR endorsed that statement in **Cheung's** case. Immediately before doing so and in the same paragraph, the present Master of the Rolls provided his own formulation, referring in terms to "a legitimate expectation", and putting it like this:

> "A test case will clearly, just as any other, determine any principles of law in accordance with the doctrine of case precedent. A test case in the field of public law will, however, have an effect which goes beyond this. Often the question at issue will be the application of uncontentious principles of public law to a particular factual situation. In such circumstances, those who defer proceedings to await the result of the test case will have a legitimate expectation that if the applicant in the test case demonstrates that he is entitled to a particular relief or treatment, they will be treated in the same way."

380. **Zequiri's** case went on appeal to the House of Lords. Their Lordships' decision was reserved and has yet to be given. I am not disposed to pronounce on cases like **Cheung** and **Zequiri** in advance of what the House of Lords may say about them. All that I propose to say in the present connection is as follows.

381. First, the **Ng Ka Ling** and **Chan Kam Nga** litigation was even more than public law test case litigation. It was, as I said when dealing with the "previous judgments unaffected" argument, constitutional litigation about an entrenched right. The appellants can, if necessary, rely on that to strengthen their "legitimate expectation" argument.

382. Secondly and moreover, the "legitimate expectation" argument is by no means confined to reliance on the nature of the **Ng Ka Ling** and **Chan Kam Nga** litigation. It is based on express

representations for which the nature of the **Ng Ka Ling** and **Chan Kam Nga** litigation provides the context.

VIII. Legitimate expectations must be taken into account

383. I turn to Mr Ma's reliance on the Court's decision in **Lau Kong Yung v. Director of Immigration** (1999) 2 HKCFAR 300 as authority for the proposition that the Director is not obliged to take legitimate expectations into account when exercising his powers under the Immigration Ordinance. In that case the Court held (by a majority of 4:1 with me as the sole dissentient) that the Director is not obliged, even though he is entitled, to take humanitarian considerations into account when exercising his powers under that section. I leave to one side my willingness to revisit that aspect of **Lau Kong Yung's** case if and when there is a majority in favour of such a course. For present purposes, it suffices that I agree with all the other members of the Court that **Lau Kong Yung's** case is not on any view an authority for the proposition that the Director may ignore legitimate expectations.

IX. The representations and the legitimate expectation in the present case

384. Four categories of representations are involved in the present case. The Director has not taken any of them into account. They are:

> (i) representations by which the Government reassured the general public that the Government would abide by the decision of the courts;
>
> (ii) representations made in letters from the Immigration Department to abode-seekers saying that, as litigation was ongoing, decisions could not for the time being be made on their applications for the right of abode;
>
> (iii) representations such as the one in the Secretary for Security's letter of 24 April 1998 to the 13th representative applicant repeating the reassurance that the Government would abide by the decision of the courts; and
>
> (iv) representations in letters from the Legal Aid Department to applicants for legal aid, repeating that reassurance and adding that they therefore need not join in existing proceedings or commence fresh proceedings.

All these representations, even those in the form of a communication to an individual, are in substance of the kind directed to a class. The class is the one made up of persons who would benefit from the application to them of the judgments in favour of the abode-seekers in **Ng Ka Ling's** case and **Chan Kam Nga's** case. All the appellants are such persons.

385. As I have pointed out, the Director has not taken any of the categories of representation into account. It is therefore premature, in my view, to consider whether he might, after he has taken them into account, seek to place on them an interpretation which he would seek to defend as one which was not "so aberrant that it cannot be classed as rational". Those words are taken from Lord Mustill's speech in **R v. Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd** [1993] 1 WLR 23 at p.32 H and quoted by Lord Slynn of Hadley in **Walker's c**ase at p.813 A. Moreover it is to be noted in any event that neither of those two cases involved the interpretation of any representation.

386. The **Monopolies and Mergers Commission** case involved the interpretation of a criterion laid down by statute for the commission to apply. And Lord Mustill was discussing the position which arises where (as he put it at p.32 G) such a criterion was "so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a

given case". His Lordship then proceeded to cite **Edwards v. Bairstow** [1956] AC 14, also not a legitimate expectation case.

387. **Walker's** case involved the interpretation of a phrase in a discretionary ex gratia compensation scheme introduced by the British Ministry of Defence to provide compensation for members of the British armed forces injured abroad as a result of crimes of violence. And the phrase in question was one which Lord Slynn of Hadley said (at p.813 A) was "imprecise enough for several meanings to be adopted". It is to be noted that Lord Hoffmann said in terms (at p.816 B) that **Walker's** case was not a case like **Coughlan's** case "in which a public authority made a specific promise and then withdrew it".

388. Finally in this connection, I feel bound to say in fairness to the Government that they may not wish to contend that the statements which they chose to make with a view to reassuring the public were in fact too imprecise to achieve that purpose. And it could be said to be an abuse of power in itself for the executive to extract from its utterances a less than plain meaning in order to frustrate an expectation reasonably and therefore legitimately formed by members of the public upon hearing those utterances. Such a thing, if countenanced by the judiciary, could seriously undermine public confidence in government statements.

389. Leaving aside the "previous judgments unaffected" argument and proceeding only on the "legitimate expectation" argument, I take the following view. On the relevant legal principles which I have examined and in the material circumstances of the present case, each of those four categories of representation gave rise to a legitimate expectation on the part of the appellants. That legitimate expectation was that persons like them would be treated in the same way as the abode-seekers in **Ng Ka Ling's** case and **Chan Kam Nga's** case. Even after the Interpretation, this expectation of theirs remains legitimate. It is legitimate to the extent that such treatment is possible. And such treatment is possible inasmuch as and to the extent that the Director can exercise his discretionary powers not to remove them from Hong Kong and to facilitate their staying here to make Hong Kong their home and to build up the seven years' ordinary and continuous residence which would, by virtue of art. 24 (2)(2) of the Basic Law, gain them Hong Kong permanent resident status and therefore the right of abode here. To ignore their remaining legitimate expectation would be an abuse of executive power, which is the very thing that the doctrine of legitimate expectation exists to protect against.

390. The representations in categories (iii) and (iv) are more direct than those in categories (i) and (ii). And the representations in category (iv) go further than those in the other three categories. As things appear to me at present, I have no difficulty accepting that once the Director duly considers their legitimate expectation, the category (iii) representees are likely to succeed and the category (iv) representees are almost assured of success. But just because they are not in as strong a position as the category (iv) or even the category (iii) representees, it does not mean that the category (i) or (ii) representees are acting frivolously in seeking an open-minded even though belated consideration by the Director of their legitimate expectation claims. As I have endeavoured to demonstrate and emphasise, the doctrine of legitimate expectation plays a very important role in the preservation of the rule of law. That being so, I think that it must follow that once a court finds that an administrative decision has been made against a person without due regard to his legitimate expectation, the court should be slow to withhold relief from him.

391. That is particularly so in the present case. In a cogent dissent (which I respectfully regard as well on its way to full vindication if it has not already been fully vindicated) Lord Nicholls of Birkenhead put it like this in **Briggs v. Baptiste** [2000] 2 AC 40 at p.58 B: "If Anthony Briggs is denied this possibility, he will be denied his constitutional rights ..." The possibility there was that the Inter-American Court of Human Rights would make an order that Mr Briggs's sentence of death be commuted, so that he could then, at the very least, confront the government of Trinidad and Tobago with such an order. (Whether Mr Briggs could have recourse to the courts of Trinidad and Tobago to enforce such an order was, Lord Nicholls of Birkenhead noted, a question to be decided

on another occasion.) In the present case, the possibility (putting it no higher than that for the moment where the categories (i) and (ii) representees are concerned) is of a favourable decision by the Director on their legitimate expectation claims or, failing that, substantive enforcement of those claims by the courts.

392. Each appellant's legitimate expectation is of being treated as far as possible in accordance with the judgments in cases which tested a constitutional right and determined the issue in favour of persons like them. If successful they could in time build up the residence which they need for the purpose of acquiring the right of abode under the Basic Law. Adopting Lord Nicholls of Birkenhead's way of analysing the implications in situations of this sort, I hold as follows. Take the case of a person who seeks an opportunity to establish a constitutional right or a position which immediately approaches that right and would in the normal way lead eventually to it. The question then is whether there is a possibility ? which of course means a real possibility and not merely a wild hope on his part ? that he would succeed if given such an opportunity. If there is, then denying him that opportunity would be tantamount to a denial of constitutional rights.

393. On the material to hand, I think that once the Director considers their legitimate expectations, the category (iii) representees are likely to succeed and the category (iv) representees are almost assured of success. Even so, I do not think that it can be said that their cases are extreme ones which justify taking them out of the Director's hands and proceeding directly to substantive enforcement at this stage.

394. Still less ? and far less ? do I think that it can be said at this stage that ultimate defeat is the inevitable fate of the categories (i) and (ii) representees. Each of them has a legitimate expectation. What justification is there for insisting that the Director is bound to disappoint such expectation and, what is more, that the courts are bound to do the same? I see none.

395. Whether judicial review proceedings by any appellant or appellants whom the Director may decide against would succeed is a question to be decided on another occasion. I do not know if the Director would decide against any appellant upon a reconsideration. Nor do I know, if he does that, what the Director might do in the way of putting forward an overriding public interest with a view to justifying decisions which disappoint the legitimate expectation involved. Without implying any weakness in any other appellant's case, I think it fair to say this for the category (iv) representees in particular. Quite apart from anything else, they more than any of the others appear inherently likely to have acted on the representations in such a way as to be able to invoke detrimental reliance in answer, or further answer, to anything which may be put forward as an overriding public interest in an effort to justify disappointing the legitimate expectation involved.

396. On the "legitimate expectation" ground, just as on the "previous judgments unaffected" ground, all the removal orders should be quashed. However, one cannot declare on the "legitimate expectation" ground on its own (as one could declare on the "previous judgments unaffected" ground) that all the appellants are Hong Kong permanent residents with the right of abode here. On the "legitimate expectation" ground on its own, the declaration to be made would be a declaration as to the Director's exercise of his discretionary powers including his powers under sections 13 and 19 (1)(b) of the Immigration Ordinance, Cap. 115.

397. Section 13 provides that:

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

Section 19(1)(b) provides that the Director "may" make a removal order against a person requiring him to leave Hong Kong if it appears to the Director that that person:

> "(i) might have been removed from Hong Kong under section 18(1) if the time limited by section 18(2) had not passed; or
>
> (ii) has (whether before or after commencement of the Immigration (Amendment) (No.4) Ordinance 1981 (75 of 1981)) landed in Hong Kong unlawfully or is contravening or has contravened a condition of stay in respect of him; or
>
> (iia) not being a person who enjoys the right of abode in Hong Kong, or has the right to land in Hong Kong by virtue of section 2AAA, has contravened section 42; or

being a person who by virtue of section 7(2) may not remain in Hong Kong without permission of an immigration officer or immigration assistant, has remained in Hong Kong without such permission."

398. Leaving aside the appellants' "previous judgments unaffected" argument, I hold that they would be entitled, even on their "legitimate expectation" ground alone, to: (i) the quashing of all the removal orders; and (ii) a declaration that the Director must, in exercising his discretionary powers including his powers under sections 13 and 19 of the Immigration Ordinance, take into account the appellants' legitimate expectation of being treated as far as possible in the same way as the abode-seekers who were named parties in **Ng Ka Ling's** case and **Chan Kam Nga's** case.

399. The foregoing could be said to involve a wide exercise of what is a discretion which would in practice normally be exercised in exceptional circumstances. But an exercise of discretion is not open to fatal objection on that ground. Just because a discretion is to be exercised exceptionally, it does not mean that it must invariably be exercised narrowly. If there is a wide-ranging abuse of executive power to be protected against, then there is no reason why a discretion available to protect against such abuse of power cannot be exercised commensurately widely. The principle is as famously stated by Lord Mansfield CJ when delivering the judgment of the Court of King's Bench in **Taylor v. Horde** (1757) 1 Burrow 60 at p.119; 97 ER 190 at p.223: "There is no injury or wrong for which the law does not provide a remedy." I do not regard the fact that an abuse of executive power is on a large scale as a reason for letting such abuse pass unremedied. Nor do I regard it as any part of the statutory purpose of the provisions in question that those provisions cannot be resorted to even when resorting to them would avoid an abuse of executive power.

400. What is to happen if the Director were to disappoint the appellants' legitimate expectation even after taking it into account will have to be decided in such fresh proceedings as the disappointed persons may bring.

X. The appellants' other arguments

401. I do not propose to deal with the appellants' other arguments beyond saying this. In addition to what I hold in the appellants' favour on their "previous judgments unaffected" and "legitimate expectation" arguments, and without in any way derogating therefrom to any appellant's disadvantage, I respectfully concur in everything decided by the other members of the Court in favour of the appellants or any of them on any of the appellants' other arguments.

XI. Conclusion

402. I thank counsel and solicitors on both sides for the material and arguments which they have prepared and presented, and I acknowledge with gratitude the assistance which I have derived from the judgments of the learned judges in the courts below.

403. I would allow all these appeals. As I have indicated, I accept the appellants' "previous judgments unaffected" argument. On that basis, I would allow all these appeals to the fullest extent in favour of all the appellants by (i) quashing all the removal orders and (ii) declaring that all the appellants are Hong Kong permanent residents with the right of abode here.

404. Even if I were to proceed on the "legitimate expectation" ground alone, I would still allow all these appeals so as to (i) quash *all* the removal orders and (ii) make a declaration in favour of all the categories of representees, in other words, *all* the appellants. Such declaration would be that the Director must, in exercising his discretionary powers, including his powers under sections 13 and 19 of the Immigration Ordinance, take into account all the appellants' legitimate expectation of being treated as far as possible in the same way as the abode-seekers who were named parties in **Ng Ka Ling's** case and **Chan Kam Nga's** case. I would spell it out in the declaratory order that such treatment is possible to the following extent. The Director can exercise his discretionary powers: (i) to authorise all the appellants to remain in Hong Kong; and (ii) to refrain from making a removal order against any of them. He can thus exercise his discretionary powers so as to enable all of them to stay here to make Hong Kong their home and build up seven years' ordinary and continuous residence in Hong Kong. Such residence would, by virtue of art. 24(2)(2) of the Basic Law, gain all of them Hong Kong permanent resident status and therefore the right of abode in Hong Kong.

405. In addition to what I hold in the appellants' favour on their "previous judgments unaffected" and "legitimate expectation" arguments, and without in any way derogating therefrom to any appellant's disadvantage, I respectfully concur in everything decided by the other members of the Court in favour of the appellants or any of them on any of the appellants' other arguments.

406. This being constitutional litigation between persons on legal aid and the Government, I respectfully agree with the other members of the Court that there should be no order as to costs save for an order for legal taxation of all the appellants' own costs.

407. As can be seen, I would go further in favour of all the appellants than the other members of the Court see fit to go. And the extent to which I would do so is undeniably considerable. But it should be understood that I never part company with my colleagues except after long pause and with due respect.

Chief Justice Li :

408. The Court makes the orders and directions set out in the concluding paragraphs (paras. 294 to 301) under the heading "Relief" in the judgment of myself, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ. The decision of the Court is unanimous in so far as these appeals are allowed but is by a majority (with Mr Justice Bokhary PJ dissenting) in so far as these appeals are dismissed.

(Andrew Li)	(Kemal Bokhary)	(Patrick Chan)
Chief Justice	Permanent Judge	Permanent Judge

(R A V Ribeiro)
Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Representation:

Mr Geoffrey Robertson, QC and Mr S.H. Kwok instructed by Messrs Pam Baker & Co. and assigned by the Legal Aid Department for the appellants in FACV No. 1 of 2001

Ms Gladys Li, SC and Mr S.H. Kwok instructed by Messrs Clarke & Kong and assigned by the Legal Aid Department for the appellant in FACV No. 2 of 2001

Ms Gladys Li, SC and Mr S.H. Kwok instructed by Messrs Barnes & Daly and assigned by the Legal Aid Department for the appellants in FACV No. 3 of 2001

Mr Geoffrey Ma, SC, Mr Joseph Fok, SC and Mr Daniel Wan instructed by the Department of Justice for the respondent in FACV Nos. 1, 2 & 3 of 2001

(month=1-2002)