LC Paper No. CB(2)549/99-00(01)

FACV Nos 10 and 11 of 1999

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NOS 10 AND 11 OF 1999 (CIVIL)

(ON APPEAL FROM CACV NOS 108 AND 109 OF 1999)

Between:

LAU KONG YUNG (an infant suing by his father and next friend LAU YI TO) and 16 others	**Respondents**
-and-	
THE DIRECTOR OF IMMIGRATION	**Appellant**

Court:	Chief Justice Li, Mr Justice Litton PJ, Mr Justice Ching PJ, Mr Justice Bokhary PJ and Sir Anthony Mason NPJ
Date of Hearing:	25, 26, 27 and 28 October 1999
Date of Judgment:	3 December 1999

JUDGMENT

Chief Justice Li:

In February 1999, the Director of Immigration made removal orders under sec 19(1)(b) of the Immigration Ordinance against the 17 respondents. They applied to challenge the removal orders by judicial review and habeas corpus. That challenge failed before Yeung J, [1999] 2 HKLRD 58, but succeeded before the Court of Appeal [1999] 2 HKLRD 516 (Chief Judge, Nazareth and Mortimer VPP). The Director appeals to the Court.

The central question in this appeal relates to "the Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" ("the Interpretation"). The Interpretation was adopted on 26 June 1999, after the Court of Appeal's judgment on 11 June 1999.

Terminology

I shall refer to the Director of Immigration, the appellant, as "the Director" and the 17 respondents to the appeal, who were the applicants on the challenge, as "the applicants". The Immigration

Ordinance will be called "the Ordinance". I shall refer to the following in full or in abbreviation as follows: The People's Republic of China as "PRC"; the National People's Congress of the PRC as "NPC"; the Standing Committee of that Congress as "the Standing Committee" or as "NPCSC"; the Hong Kong Special Administrative Region of the People's Republic of China as "the Region" or "Hong Kong" or "HKSAR".

The applicants

The 17 applicants are Chinese nationals born on the Mainland. They claim the right of abode in Hong Kong by descent on the basis that at least one parent is a permanent resident of Hong Kong. 5 applicants (the 1st, 6th, 10th, 12th and 14th applicants) were born after one of their parents became a permanent resident ("the 5 applicants"). The remaining 12 applicants were born before one of their parents became a permanent resident ("the 12 applicants").

15 applicants (that is the applicants except the 12th and 14th applicants) came from the Mainland on two way permits. The 14th applicant went from the Mainland to Singapore to study in 1994 and came to Hong Kong in July 1997 as a visitor. All applicants had overstayed in Hong Kong in breach of the conditions of stay imposed by

the Director except the 12th applicant who had come illegally in the first instance.

All 17 applicants had arrived in Hong Kong before 29 January 1999. Apart from 2 applicants (the 6th and 16th applicants), they allege that they had claimed the right of abode before that date. 29 January 1999 is a significant date because, on that day, the Court delivered its unanimous judgments in *Ng Ka Ling & others v Director of Immigration* (1999) 2 HKCFAR 4 (also reported at [1999] 1 HKLRD 315 and [1999] 1 HKC 291) ("*Ng Ka Ling*") and *Chan Kam Nga & Others v Director of Immigration* (1999) 2 HKCFAR 82 (also reported in [1999] 1 HKLRD 304 and [1999] 1 HKC 347) ("*Chan Kam Nga*"). I shall come to these judgments in a moment.

Director's position following outcome of this appeal

At the outset, I should record that in the event of his appeal succeeding and the removal orders being restored, the Director has undertaken to the Court that he will not detain or remove from Hong Kong the 17 applicants pending:

(a) consideration by the Director of whether to revoke the

removal orders issued against these 17 applicants; and

(b) the institution of legal proceedings by any of the 17 applicants who may wish to challenge the Director's decision not to revoke the removal order issued against that particular applicant within 28 days of such decision.

The power to revoke is contained in sec 46 of the Interpretation and General Clauses Ordinance, Cap. 1.

Further, Mr Geoffrey Ma SC, for the Director, has informed the Court that in the event of his failing on the appeal so that the removal orders remain quashed, the Director will give consideration to the making of fresh removal orders against the 17 applicants.

So, the position is that whatever the result of the appeal as concerns the removal orders, the Director will consider the question of removal again.

The scheme introduced in July 1997: the original scheme

On 1 July 1997, the Basic Law came into effect. Article

24(2) sets out the six categories of persons who shall be permanent residents who under Article 24(3) shall have the right of abode in Hong Kong. The first three categories are:

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

On that day, the legislature, then the Provisional Legislative Council, enacted the Immigration (Amendment) (No. 2) Ordinance ("the No. 2 Ordinance"). This Ordinance replaced Schedule 1 to the Immigration Ordinance, Cap. 115 with a new schedule to set out the categories of persons who are permanent residents. In prescribing for the permanent residents by descent in Article 24(2)(3) of the Basic Law, the new Schedule 1 in para. 2(c) ("para. 2(c) of Schedule 1") stipulated the requirement that "the parent had the right of abode in Hong Kong at the time of the birth of the person". I shall refer to this requirement as "the time of birth limitation".

On 10 July 1997, the legislature enacted the Immigration

(Amendment) (No. 3) Ordinance ("the No. 3 Ordinance") to introduce a scheme to deal with the permanent residents by descent under the category in para. 2(c) of Schedule 1 ("the original scheme"). Pursuant to his power under the No. 3 Ordinance, the Director specified by notice dated 11 July and gazetted on 16 July 1997 the manner in which applications under the scheme should be made ("the Notice"). That scheme is fully set out in the judgment of the Court delivered on 29 January 1999 in *Ng Ka Ling* and I shall not burden this judgment by setting it out again. In that judgment, the operation of the original scheme in relation to a Mainland resident claiming the status of permanent resident by descent under para. 2(c) of Schedule 1 was set out in these terms (at 21):

> "(1) He has to apply to the Director for a certificate of entitlement through the Mainland Exit-Entry Administration in the district where he is residing in the Mainland. His application to the Mainland Exit-Entry Administration for a one way permit may be regarded as an application for a certificate of entitlement.
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> (2) After confirming the person's identity, nationality and the validity of his parents' marriage, the Mainland Exit-Entry Administration will send his application to the Director for processing. If the Director is satisfied, he will issue a certificate of entitlement. This will be sent to the Mainland Exit-Entry Administration.
>
> (3) He is subject to the quota for one way permits determined and operated by the Mainland authorities. Upon the grant of the one way permit by the Mainland Exit-Entry Administration, his certificate of entitlement will be affixed by them to that permit. The one way permit is the valid travel document for him contemplated by the scheme introduced by the No. 3 Ordinance.

(4) His status can *only* be established by his holding the one way permit affixed with the certificate of entitlement. Without this, he shall be regarded as not enjoying the right of abode. This is so notwithstanding that the Director is satisfied of his status as a permanent resident by descent and has issued the certificate of entitlement (which would be sent to the Mainland Exit-Entry Administration). Under the scheme, that certificate alone is insufficient to establish his status. It can only be established by bolding a one way permit affixed with the certificate.

(5) He cannot come to Hong Kong to make his application. It must be made to the Mainland Exit-Entry Administration in the district in the Mainland where he is residing. If he is physically in Hong Kong, he is treated as residing in the Mainland during his stay in Hong Kong for the purposes of the scheme's operation. He cannot resist a removal order made under the Immigration Ordinance (Cap. 115) by producing evidence to establish his status. He can *only* establish that status by holding a one way permit affixed with a certificate of entitlement."

The original scheme also provided that, apart from holding (a) the one way permit affixed with the certificate of entitlement, a person's status as a permanent resident by descent under para. 2(c) of Schedule 1 could be established by his holding of (b) a valid HKSAR passport or (c) a valid permanent identity card. But as pointed out in *Ng Ka Ling* (at 18A - C), any person holding (b) or (c) would already have established his right of abode. So the relevant provision for a person *claiming* permanent resident status by descent is (a).

The Court's judgments on the challenge to the scheme

In its judgments in *Ng Ka Ling* and *Chan Kam Nga* delivered on 29 January 1999, the Court dealt with a constitutional

challenge to the No. 2 and No. 3 Ordinances. For the purposes of this appeal, two aspects of that challenge are relevant, namely, the challenge to the time of birth limitation and the challenge to the original scheme.

As to the former, the Court held in *Chan Kam Nga* that the date of birth limitation in para. 2(c) of Schedule 1 was unconstitutional. The Court so held as a matter of interpretation of Article 24(2)(3) of the Basic Law. According to the judgment, Chinese nationals born on the Mainland even before one parent had acquired the right of abode would be within the category of permanent residents by descent in para. 2(c) of Schedule 1.

As to the challenge to the original scheme, the Court held in *Ng Ka Ling* that the No. 3 Ordinance was unconstitutional to the extent that it requires permanent residents of the Region residing on the Mainland to hold the one way permit before they can enjoy the constitutional right of abode. Accordingly, the Court declared that the relevant provisions in the No. 3 Ordinance and the relevant paras in the Director's Notice as set out in its judgment (at 45J - 46G) were null and void.

In *Ng Ka Ling*, the Court rejected the argument that Article 22(4) qualifies the right of abode in Article 24(3). Article 22(4) 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."

The Court held that the right of abode is a core constitutional right and reasoned (at 35A - D):

> ".... A generous approach has to be applied to interpreting the right of abode provision. Considering the language of art. 24 and art. 22(4), in our view, "people from other parts of China", including among them persons entering for settlement referred to in art. 22(4), do not include permanent residents of the Region upon whom the Basic Law confers the right of abode in the Region. Persons with permanent resident status under the Basic Law are not, as a matter of ordinary language, people from other parts of China. They are permanent residents of this part of China. Nor is it correct to describe them as persons entering for the purpose of settlement. Their status is that of permanent residents of the Region. They do not enter the Region for the purpose of settlement. They are permanent residents with the right to enter the Region and to remain as long as they wish.
>
> In our view, full effect can be given to art. 22(4), according to its true interpretation, without any encroachment on the right of abode in art. 24. Article 22(4) does not apply to permanent residents of the Region. What it does apply to is the overwhelming part of the population on the Mainland who have no right of abode in the Region. They cannot enter the Region without approval notwithstanding they live in the country of which the Region forms part. ...."

The Court in *Ng Ka Ling* did not strike down the entire

original scheme as unconstitutional. The Court made this clear (at 36F - 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."

In holding the original scheme apart from the one way permit requirement to be constitutional, the Court stated that it took into account "that the Director must operate it lawfully in a fair and reasonable manner and that there are safeguards to which its operation is subject" which the Court then described as follows (at 36I - 37C):

> " First, as a matter of statutory construction, the courts would import the requirement of reasonableness into a number of provisions for operating such verification scheme. For example, the Director may specify the manner in which an application for a certificate of entitlement shall be made by notice in the *Gazette* (s.2AB(2)(a)). But that power is to be construed as what he may *reasonably* specify. Secondly, if there is unlawful delay by the Director in coming to a decision whether to accept or reject an application, the person concerned, although in the Mainland, can invoke public law remedies in our courts. Thirdly, if the Director decides to refuse the application for a

certificate, there is a statutory right of appeal to the Immigration Tribunal. This appeal safeguard is a full one. The Director is under a statutory duty to give reasons for his refusal. There is a period of 90 days within which to appeal. The Tribunal, whose decision the statute provides to be final, is under a duty to determine "on the facts of the case as it finds them" whether the person concerned is a permanent resident by descent and to allow the appeal where it determines that he is."

The Court struck out paras A(i) and B of the Notice. These paragraphs specified the manner in which an application for a certificate of entitlement was to be made. Para. A(i) stated that an application by a person residing in the Mainland of China 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 of China for settlement in Hong Kong may be regarded as an application for a certificate of entitlement. In striking out these paragraphs, the Court said (at 38F - I):

" As far as the Director's Notice is concerned, although it is not subsidiary legislation, we can excise the parts which are objectionable following our conclusion on the issue of the constitutionality of the No 3 Ordinance. As we understand the position, the justification for involving the Mainland Exit-Entry Administration is the requirement under the scheme in the No 3 Ordinance for the one way permit which we have held to be unconstitutional. We do not know whether the Director wishes to involve them and whether they are willing to be involved as agent of the Immigration Department on the Mainland to facilitate applications for certificates of entitlement under the scheme as severed. We therefore strike out paras. A(i) and B of the Notice. 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. It is unobjectionable if it has to be made to an entity on the Mainland provided that it functions as an agent of Hong Kong's Immigration Department to facilitate applications for certificates of entitlement. Whether the Mainland Exit-Entry Administration is an appropriate entity for this purpose is for the Director and that administration to consider."

The position after the judgments: the modified scheme

As stated above, the Court delivered its judgments in *Ng Ka Ling* and *Chan Kam Nga* on 29 January 1999. As a result of *Chan Kam Nga*, the time of birth limitation had gone. The effect of the Court's judgment in *Ng Ka Ling* on the original scheme was succinctly summarised by the Chief Judge in the Court of Appeal's judgment in this appeal as follows (at 525J - 526D):

"(1) it is reasonable for the legislature to introduce a scheme which provides for the verification of a person's claim to be a permanent resident;

(2) the scheme introduced by the No. 3 Ordinance, apart from the requirement of one-way permits, is constitutional as it cannot be said to go beyond verification. It is constitutional:

(a) in requiring a claimant to apply for and obtain a certificate of entitlement from the Director, and

(b) in providing that his status as permanent resident can *only* be established by his holding such a certificate;

(3) The provisions of the scheme whereby a person 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;

(4) The Director must operate the scheme lawfully in a fair and reasonable manner. There must be safeguards to which its operation is subject

> and the requirement of reasonableness must be imported into a number of provisions for operating such a verification scheme."

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.

So, when the Director came to consider the making of the removal orders in question, the position was that the modified scheme prevailed but it was unworkable and the Director could not process applications by claimants residing in the Mainland. Persons ordinarily resident in the Mainland but physically present in Hong Kong without the authority of the Director or subject to conditions of stay are to be regarded under the Notice as residing in the Mainland. That part of the Notice was held to be constitutional and therefore formed part of the modified scheme.

The removal orders

The removal orders against the 17 applicants were made by the Director on various dates in February 1999. I shall take the removal order and the related documentation from the case of the 1st applicant Lau Kong Yung as a typical example.

The removal order was in these terms:

" REMOVAL ORDER

Whereas it appears to me that

.... is contravening or has contravened a condition of stay in respect of him: .... in exercise of the powers conferred by section 19(1)(b) of the Immigration Ordinance (Chapter 115), I hereby make a removal order requiring the said person to leave Hong Kong."

The order was signed by Mr MAK Kwai Yun, Assistant Director of Immigration ("Mr Mak"). He was exercising delegated authority from the Director.

Section 19(1)(b)(ii) provides:

" (1) A removal order may be made against a person requiring him to leave Hong Kong -

(b) by the Director if it appears to him that that person -

(ii) has .... landed in Hong Kong unlawfully or is contravening or has contravened a condition of stay in respect of him;"

Paragraph 1 of an internal memorandum to Mr Mak from an immigration official stated:

" This is a case for consideration of issue/non-issue of removal order, and/or strong or powerful humanitarian grounds or other circumstances which would justify remaining in the Hong Kong Special Administrative Region. The case file is attached for your perusal. I am satisfied that the status of this person as a permanent resident under paragraph 2(c) of Schedule 1 to the Immigration Ordinance cannot be established in accordance with section 2AA(1) of the Ordinance."

Section 2AA(1) of the Ordinance, with the omission of the parts declared null and void by the Court in *Ng Ka Ling*, provided:

> **"2AA. Establishing status of permanent resident under paragraph 2(c) of Schedule 1**
>
> (1) A person's status as a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can only be established by his holding of
>
> (a) a valid certificate of entitlement issued to him;
>
> (b) a valid HKSAR passport issued to him; or
>
> (c) a valid permanent identity card issued to him."

Paragraph 2 of the memorandum set out the name of the applicant and the file reference and stated: "I believe that the person entered Hong Kong on or about 10 September 1997 from the Mainland of China".

Paragraphs 3 and 4 read:

> "3. I am of the view that there are no known powerful or strong humanitarian grounds or other exceptional circumstances which could justify recommendation for remaining in the Hong Kong Special Administrative Region.
>
> 4. I recommend this person's removal under section 19(1)(b) and detention pending removal under section 32(3A) of the Immigration Ordinance. I further recommend that this person be removed to the Mainland of China under section 25(4)."

After Mr Mak made his decision, he appended the following minute on the internal memorandum:

> " I have considered the circumstances in respect of the one person named above and hereby order the removal of the person under section 19(1)(b) of the Immigration Ordinance. I have signed the removal order in respect of this person and I also authorise his detention under section 32(3A) pending removal. I further direct that this person be removed to the Mainland of China."

The removal order together with a "Summary of facts and reasons for removal" was then served on the 1st applicant who was later released on his recognizance. The summary had three paragraphs. The first set out the applicant's details. The second stated the reasons for removal:

> " Master LAU has contravened his condition of stay by overstaying in the Hong Kong Special Administrative Region since 2 December 1997 and his status as a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 to the Immigration Ordinance cannot be established in accordance with section 2AA(1) of the same Ordinance."

The third paragraph contained a summary of facts. In the case of the 1st applicant, it was in these terms:

" Master LAU arrived at the Hong Kong Special Administrative Region on 10 September 1997, travelling on his Two-way Chinese Exit Permit, and was permitted to remain until 1 December 1997. He did not depart and had overstayed since 2 December 1997. On 1 February 1999, he surrendered to the Immigration Department for regularization of stay and was referred to the Victoria Immigration Centre for enquiries on 2 February 1999. He is currently detained at Pui Chi Boys' Home.

Though Master LAU was born in the Mainland of China to his Hong Kong permanent resident father, Mr LAU Yi-to, his status as a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 to the Immigration Ordinance cannot be established in accordance with section 2AA(1) of the same Ordinance.

He has no close relatives in the Mainland of China. His parents and brother are in the Hong Kong Special Administrative Region."

In making the removal orders, Mr Mak was plainly satisfied that none of the applicants held a certificate of entitlement (or a HKSAR passport or a permanent identity card).

But the question of whether he had considered humanitarian grounds or other exceptional circumstances had not been raised as an issue in the proceedings and there was no evidence directed to this issue.

Both Mr Mak and the immigration official who wrote the internal memorandum to him in most of the 17 cases and authorized the recommendation in the other cases filed affidavits. But they were directed to a different issue, namely, whether the statement of facts in the summary in 15 of the 17 cases (i) *meant* that the Immigration Department

had accepted their status as permanent residents by descent or (ii) was merely setting out the applicant's claim. The Judge found as a fact that the statement simply set out the claim. That finding was not challenged on appeal. In the other two cases, the wording in the summary made clear that it was setting out the claim.

The documentation may tend to suggest that the question of humanitarian grounds or other exceptional circumstances was considered. The internal memorandum referred to the lack of "powerful or strong humanitarian grounds or other exceptional circumstances which could justify recommendation for remaining in the HKSAR". And Mr Mak's minute enclosed on the memorandum stated that he had considered the circumstances in respect of the applicant concerned.

Although the summary of facts and reasons for removal touched on the whereabouts of the applicant's family, they did not refer to the absence of humanitarian grounds or other exceptional circumstances, these being discretionary grounds. But nothing can be read into this. The summary was expressed to be served under para. 8(1)(b) of the Third Schedule to the Immigration Regulations. This provision obliges the Director to serve such a summary after notice of appeal against a removal

order has been given. In these cases, a summary was served, notwithstanding that no notice of appeal appears to have been filed. In any event, an appeal to the Immigration Tribunal cannot be brought on discretionary grounds. Sec. 53D of the Ordinance. In these circumstances, the summary in these cases should not be regarded as dealing with the question whether such grounds existed.

The question whether the Director in making the removal orders considered discretionary grounds such as humanitarian grounds or other exceptional circumstances was not an issue in this Court or the lower courts. And no evidence was directed at this question. In these circumstances, although the documentation may tend to suggest that they were considered, it would not be right for the Court of Final Appeal to make a finding on this question for the first time.

One thing however is clear. In February 1999, in the context of the scheme as modified by the Court's judgments, the applicants were concentrating on maintaining their claim to the right of abode to the Director as a matter of right. They were not putting a case to him for the exercise of discretion under any statutory provision, section 19 or otherwise. This point was emphasised by Mr Ma SC for the

Director:

> "The Director was not required to consider any other basis since it was clear that all these applicants were only claiming permanent resident status to enable them to exercise the right of abode by reason of Article 24(2)(3). No other matters were put before the Director (see Para. 7 of the Director's submissions in reply)."

Mr Ma SC also maintains that the evidence shows that the Director did consider the position of the applicants from a humanitarian point of view. I have already concluded that no such finding of fact should be made by the Court.

It should be noted that a claimant cannot lodge an appeal to the Tribunal against the refusal by the Director to issue a certificate of entitlement while he is in Hong Kong (see s.2AD(3)). And the lodging of an appeal confers no right to remain in Hong Kong (see s.2AD(9)). Although a claimant can appeal against the making of a removal order on the ground that he has the right of abode, the Tribunal cannot allow an appeal on this ground unless the claimant's status has been established in the manner prescribed by sec. 2AA(1), that is by holding a certificate of entitlement (or a HKSAR passport or a permanent identity card). These aspects of the original scheme survived the challenge and were part of the modified scheme. See *Ng Ka Ling* at 18J - 19C and 36H.

The events leading to the Interpretation

On 26 June 1999, the Standing Committee of the National People's Congress adopted the Interpretation. Before its adoption, Mr Qiao Xiaoyang, Deputy Director of the Legislative Affairs Commission of the Standing Committee ("Mr Qiao"), made a speech to it on 22 June 1999 explaining the Interpretation which was then in draft form.

Mr Qiao's speech set out the events leading to the Interpretation. On 20 May 1999, the Chief Executive of the HKSAR under Articles 43 and 48(2) of the Basic Law submitted a report to the State Council "seeking the assistance of the Central People's Government in resolving the problems encountered in the implementation of the relevant provisions of the Basic Law". The report set out the circumstances. It noted that the Court's interpretation of Articles 22(4) and 24(2)(3) differed from the HKSAR Government's understanding of the relevant provisions. It stated that Hong Kong's prosperity and stability would be seriously affected, citing the recent survey conducted by the HKSAR Government that at least an addition of 1.67 million persons in the Mainland would qualify as a result of the Court's judgments; about 690,000 in the first generation and 980,000 in the

second generation after the first generation have ordinarily resided for 7 years. The report requested the State Council "to seek an interpretation of Articles 22(4) and 24(2)(3) in accordance with the stipulations of the Constitution of the PRC and the Basic Law".

According to Mr Qiao's speech, having considered the Chief Executive's Report, the State Council submitted to the NPCSC the Motion regarding the request for an interpretation of Articles 22(4) and 24(2)(3) of the Basic Law.

Mr Qiao's speech stated that the Council of Chairmen of the NPCSC examined the Motion and considered that the issue raised concerned the interpretation of relevant provisions by the Court and that the provisions are within those referred to in Article 158(3). Mr Qiao stated:

> "Before making its judgment, [the Court] had not sought an interpretation of the NPCSC in compliance with the requirement of Article 158(3). Moreover, the interpretation of [the Court] is not consistent with the legislative intent. In accordance with .... Article 67(4) of the Constitution of the PRC .... and Article 158(1) of the Basic Law .... and in order to ensure the proper implementation of the Basic Law, it is imperative and appropriate for the NPCSC to make an interpretation of the relevant provisions of the Basic Law. In view of this, the Council of Chairmen has put forth *The Interpretation by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law of the HKSAR of the PRC (Draft)* and has consulted the Committee for the Basic Law of the HKSAR under NPCSC".

Mr Qiao then explained the contents of that draft.

The Interpretation

The Interpretation by the NPCSC on 26 June 1999 was gazetted in Hong Kong. An English translation was also published in the gazette for information.

The Interpretation was headed: The Interpretation by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law.

The Preamble stated that the Standing Committee had examined the State Council's Motion regarding the request for an interpretation of Articles 22(4) and 24(2)(3) of the Basic Law which was submitted upon the report furnished by the Chief Executive of the HKSAR under the relevant provisions of Articles 43 and 48(2) of the Basic Law. The Preamble went on to say that the issue raised in the Motion related to the interpretation of the relevant provisions of the Basic Law by the Court. Those provisions concerned affairs which are the responsibility of the Central People's Government and concerned the relationship between the Central Authorities and the HKSAR. The

Preamble, after stating that before making its judgment, the Court had not sought an interpretation of the NPCSC in compliance with the requirement of Article 158(3) of the Basic Law, continued: "Moreover the interpretation of the Court of Final Appeal is not consistent with the legislative intent." The concluding part of the Preamble recited that, having consulted the Basic Law Committee under the NPCSC, the NPCSC has decided to make, under the provisions of Article 67(4) of the Constitution of the People's Republic of China and Article 158(1) of the Basic Law an interpretation of the provisions of Articles 22(4) and 24(2)(3) of the Basic Law.

I shall set out in full the rest of the Interpretation which followed, using the abbreviations "HKSAR" and "PRC":

> " 1. The provisions of Article 22(4) of the Basic Law of the [HKSAR] of the [PRC] regarding "For entry into the [HKSAR], people from other parts of China must apply for approval" mean as follows: People from all provinces, autonomous regions, or municipalities directly under the Central Government, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents, who wish to enter the [HKSAR] for whatever reason, must apply to the relevant authorities of their residential districts for approval in accordance with the relevant national laws and administrative regulations, and must hold valid documents issued by the relevant authorities before they can enter the [HKSAR]. It is unlawful for people from all provinces, autonomous regions, or municipalities directly under the Central Government, including persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents, to enter the [HKSAR] without complying with the appropriate approval procedure prescribed by the relevant national laws and administrative regulations.
>
> 2. It is stipulated in the first three categories of Article 24(2) of the

Basic Law of the [HKSAR] of the [PRC] that the "permanent residents of the HKSAR shall be:

(1) Chinese citizens born in Hong Kong before or after the establishment of the [HKSAR];

(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 [HKSAR];

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);".

The provisions of category (3) regarding the "persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)" mean both parents of such persons, whether born before or after the establishment of the [HKSAR], or either of such parents must have fulfilled the condition prescribed by category (1) or (2) of Article 24(2) of the Basic Law of the [HKSAR] of the [PRC] at the time of their birth. The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law of the [HKSAR] of the [PRC], have been reflected in the "Opinions on the Implementation of Article 24(2) of the Basic Law of the [HKSAR] of the [PRC]" adopted at the Fourth Plenary Meeting of the Preparatory Committee for the [HKSAR] of the National People's Congress on 10 August 1996.

As from the promulgation of this Interpretation, the courts of the [HKSAR], when referring to the relevant provisions of the Basic Law of the [HKSAR] of the [PRC], shall adhere to this Interpretation. 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. Other than that, the question whether any other person fulfils the conditions prescribed by Article 24(2)(3) of the Basic Law of the [HKSAR] of the [PRC] shall be determined by reference to this Interpretation."

The issues on the Interpretation

The central question in this appeal relates to the Interpretation. Three issues on the Interpretation arise from the submissions made to the Court. First, the power of the NPCSC to make the Interpretation. Secondly, the effect of the Interpretation. And

thirdly, the date from which the Interpretation is applicable.

Mr Geoffrey Ma SC, for the Director, submits that the Court should not deal with the question of the effect of the last paragraph of the Interpretation which excluded "the parties concerned in the relevant legal proceedings" from the operation of the Interpretation. Mr Denis Chang SC for the 17 applicants, who maintains that the last paragraph has no interpretative effect in that it was not an interpretation of any article of the Basic Law, did not urge us to resolve this question. It is not necessary to deal with it on this appeal.

Article 67(4) of the Chinese Constitution

Article 67(4) of the Chinese Constitution provides:

> " The Standing Committee of the National People's Congress exercises the following functions and powers:
>
> (4) to interpret laws;"

Article 158 of the Basic Law

Article 158 of the Basic Law provides:

> " 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."

The power of the Standing Committee

Article 67(4) of the Chinese Constitution confers on the Standing Committee the function and power to interpret laws. This power includes the Basic Law which is a national law. The Basic Law itself provides in Article 158(1) that the power of interpretation of this Law shall be vested in the Standing Committee.

Article 158(2) contains the authorization by the Standing Committee to the courts of the Region to interpret on their own in adjudicating cases the provisions of this Law which are within the limits

of the Region's autonomy. Article 158(3) provides that the Region's courts may also interpret other provisions of this Law in adjudicating cases, that is provisions other than those which are within the limits of the Region's autonomy. But Article 158(3) proceeds to provide that if the courts in the Region in adjudicating cases need to interpret provisions which I shall refer to as "the excluded provisions" (the expression used in *Ng Ka Ling*), namely, the provisions concerning affairs which are the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the Region, then the courts shall before rendering judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee through the Court of Final Appeal. Thus, where the conditions provided for are satisfied, the Court of Final Appeal is under *a duty* to seek an interpretation of the excluded provisions from the Standing Committee. It is convenient to refer to this as a "judicial reference". Article 158(3) goes on to provide that when the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the Standing Committee's interpretation. However, judgments previously rendered shall not be affected. Article 158(4) provides that the Standing Committee shall consult its Committee for the Basic Law before giving an interpretation.

Mr Denis Chang SC submits that the Standing Committee had no power to make the Interpretation because under Article 158, properly interpreted, the Standing Committee cannot interpret the Basic Law except upon a judicial reference by the Court which would relate only to the excluded provisions. Mr Chang argues that Article 158 imposes a constitutional restraint on the Standing Committee's power and that this accords with the high degree of autonomy accorded to the Region by the Basic Law adopted by the National People's Congress which included the power of final adjudication. See Basic Law Articles 2 and 19.

This argument cannot be accepted. It is clear that the Standing Committee has the power to make the Interpretation. This power originates from Article 67(4) of the Chinese Constitution and is contained in Article 158(1) of the Basic Law itself. The power of interpretation of the Basic Law conferred by Article 158(1) is in general and unqualified terms.

That power and its exercise is not restricted or qualified in any way by Articles 158(2) and 158(3). By Article 158(2), the Region's

courts are authorized to interpret on their own in adjudicating cases the provisions within the limits of the Region's autonomy. The words "on their own" underline the absence of a duty to refer the provisions in question to the Standing Committee for interpretation in contrast to the mandatory requirement relating to the excluded provisions provided for in Article 158(3). That provision enables the courts to interpret provisions other than those within the limits of the Region's autonomy but, where the conditions provided for are satisfied, obliges the Court of Final Appeal not to interpret the excluded provisions and to seek an interpretation from the Standing Committee. So, there is no question of Article 158(3) restricting the Standing Committee's general power in Article 158(1). That provision is directed to limiting the Court's power by requiring a judicial reference of the excluded provisions in the circumstances prescribed.

In any event, the entire scheme of Article 158 is inconsistent with the argument that restrictions are to be implied from Articles 158(2) and 158(3) on the general power of interpretation conferred by Article 158(1). The authority given by Article 158(2) to the courts of the Region stems from the general power of interpretation vested in the Standing Committee. Article 158(3) extends that authority but subject

to a qualification requiring a judicial reference. The reference results in the making by the Standing Committee of an interpretation which proceeds from the general power vested in it by Article 158(1). Mr Chang SC's submission, if it were accepted, would deny to the Standing Committee power to interpret provisions in the Basic Law other than the excluded provisions. Such a limited power of interpretation would be inconsistent with the general power conferred by Article 158(1).

Mr Chang SC relies on the different wording of the equivalent article (then numbered 169) to Article 158 in the draft Basic Law (April 1988). It reads:

> " The power of interpretation of this Law is vested in the Standing Committee of the National People's Congress.
>
> When the Standing Committee of the National People's Congress makes an interpretation of a provision of this Law, the courts of the Hong Kong Special Administrative Region, in applying that provision, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.
>
> The courts of the Hong Kong Special Administrative Region may interpret the provisions of this Law in adjudicating cases before them. If a case involves an interpretation of the provisions of this Law concerning defence, foreign affairs and other affairs which are the responsibility of the Central People's Government, the courts of the Region, before making their final judgment on the case, shall seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress.
>
> 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."

This draft article does not assist. We do not know why it was that the text of Article 158 was adopted in preference to the draft and, in any case, the draft would not lead to a different interpretation of Article 158 from that reached on the wording of that Article.

Accordingly, the Standing Committee has the power to make the Interpretation under Article 158(1). The Interpretation is binding on the courts of the HKSAR.

This conclusion on the power of the Standing Committee to interpret under Article 158(1) derives some support from Professor Yash Ghai in his work: "Hong Kong's New Constitutional Order" (2nd ed. 1999) p. 198. He expressed the view that the power of the Standing Committee to interpret is a general power. It is "plenary in that it covers all the provisions of the Basic Law; this power may be exercised in the absence of litigation."

In *Ng Ka Ling*, the Court discussed the conditions, referred to as the classification condition and the necessity condition, that have to be satisfied before a judicial reference should be made by the Court under

Article 158(3) to the Standing Committee for an interpretation of the excluded provisions (at 30H - 33H). In relation to the classification condition, the Court adopted (at 33C - E) the test: As a matter of substance what predominantly is the provision that has to be interpreted in the adjudication of the case ("the predominant test"). Applying that test, the Court did not make a judicial reference in *Ng Ka Ling*. The Preamble to the Interpretation expressed the view that before judgment the Court had not sought an interpretation of the relevant provisions of the Standing Committee "in compliance with the requirement of Article 158(3)". As this view proceeds upon an interpretation of Article 158(3) which differs from that applied by the Court in *Ng Ka Ling*, the Court may need to re-visit the classification and necessity conditions and the predominant test in an appropriate case.

THE EFFECT OF THE INTERPRETATION

Clause 1

Mr Chang SC points out that Clause 1 only interprets the first sentence of Article 22(4) of the Basic Law. He submits that Clause 1 properly read does not have the effect of linking Article 22(4) and Article 24 and therefore does not render constitutional the relevant provisions in the No. 3 Ordinance requiring the holding of the one way

permit in addition to the certificate of entitlement before the right of abode could be enjoyed.

We are concerned with the position of permanent residents by descent under Article 24(2)(3) of the Basic Law. The Interpretation clearly states that they are included in "people from other parts of China who must apply for approval". The phrase "including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents" is used twice and plainly refers to the permanent residents by descent. The words "who wish to enter [HKSAR] for whatever reason" are wide and mean what they say.

The Interpretation provides that such permanent residents by descent wishing to enter Hong Kong for whatever reason must apply to the Mainland authorities for approval and must hold valid documents issued by the relevant authorities before entry. The necessity for such approval is reinforced by the statement that it would be unlawful for such permanent residents to enter HKSAR without complying with the prescribed appropriate approval procedure. That procedure required exit approval and the valid document is the one way permit issued for those coming for settlement under a quota system. (See *Ng Ka Ling* (at 19I -

20J)). Mr Qiao in his speech explaining this part (clause 1) of the draft Interpretation referred specifically to permanent residents by descent being subjected to a quota system. He said:

> "In particular, regarding the arrangement for children born in the Mainland by Hong Kong permanent residents to come to settle in Hong Kong, special quotas are taken from the daily quotas for Mainland residents coming to Hong Kong for settlement. The relevant Mainland authorities together with the relevant HKSAR authority would examine and verify the credentials of the applicants and then issue relevant documents in batches to the persons concerned who only then may come to settle in Hong Kong. The legislative intent of Basic Law 22(4) is to affirm the long-standing system for exit-entry administration between the Mainland and Hong Kong. .... This legislative intent is solely meant to ensure that Mainland residents come to Hong Kong in an orderly manner and is consistent with the general interest of Hong Kong."

The effect of the Interpretation is that as a matter of the Basic Law, permanent residents by descent must obtain exit approval from the Mainland authorities and must hold the one way permit before entry into the HKSAR. The Interpretation therefore clearly links Article 22(4) and Article 24.

Further, the Interpretation has, in my view, the effect that permanent residents by descent are within the second sentence of Article 22(4). What gave rise to the Interpretation was *Ng Ka Ling* where the Court held in a passage (at 35A - B) already quoted in this judgment that ".... in our view "people from other parts of China", including among

them persons entering for settlement referred to in Article 22(4), do not include permanent residents of the Region upon whom the Basic Law confers the right of abode in the Region".

Considered in the light of that judgment, the effect of the Interpretation in interpreting "people from other parts of China" (with among them persons coming for settlement) to include permanent residents by descent, is that permanent residents by descent are within the second sentence. They are therefore subjected to the quota system.

Clause 2

Mr Chang SC accepts that if the Standing Committee has the power to make the Interpretation, then it is effective to render the time of birth limitation constitutional. The effect of the Interpretation is that Article 24(2)(3) means that the person concerned must have at least one parent who was a permanent resident within Article 24(2)(1) or 24(2)(2) at the time of birth of the person concerned.

The applicable date

The Interpretation, being an interpretation of the relevant provisions, dates from 1 July 1997 when the Basic Law came into effect.

It declared what the law has always been. Compare the common law declaratory theory of judicial decisions, see *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 at 1117 - 1119 and 1148.

As noted above in the earlier section headed "*The issues on the Interpretation*", I leave aside in this appeal, as requested by Mr Ma SC for the Director, the question of the persons who should not be affected by the Interpretation ("the unaffected persons question").

Summary of views on Interpretation

In summary:

(1) The Standing Committee has the power to make the Interpretation under Article 158(1).

(2) It is a valid and binding Interpretation of Article 22(4) and Article 24(2)(3) which the courts in the HKSAR are under a duty to follow.

(3) The effect of the Interpretation is:

(a) Under Article 22(4), persons from all provinces, autonomous regions or municipalities directly under the Central Government including those persons within Article 24(2)(3), who wish to enter the HKSAR for whatever reason, must apply to the relevant authorities of their residential districts for approval in accordance with the relevant national laws and administrative regulations and must hold valid documents issued by the relevant authorities before they can enter the HKSAR.

(b) To qualify as a permanent resident under Article 24(2)(3), it is necessary that both parents or either parent of the person concerned must be a permanent resident within Article 24(2)(1) or Article 24(2)(2) at the time of birth of the person concerned.

(4) The Interpretation has effect from 1 July 1997.

The resulting position

As a result of the Interpretation, the original scheme is and

has since 1 July 1997 been constitutional.

The time of birth limitation in the No. 2 Ordinance is and has since 1 July 1997 been constitutional.

The provisions in the No. 3 Ordinance and the Notice declared by the Court to be unconstitutional (as set out in the two declarations set out in A(1) and A(2) of *Ng Ka Ling* at 46A - F) are and have since 1 July 1997 been constitutional.

In *Ng Ka Ling* the Court also declared section 1(2) of the No. 3 Ordinance unconstitutional. (See the declaration in A(3) of *Ng Ka Ling* at 46F - G) Section 1(2) had deemed the No. 3 Ordinance, although enacted on 10 July 1997, to have come into effect on 1 July 1997. In my view, this is not affected by the Interpretation. In *Ng Ka Ling*, the Court in holding this retrospective provision to be unconstitutional relied on two grounds.

First, on the modified scheme, the No. 3 Ordinance took away the constitutional right of abode which a permanent resident by descent, who had arrived in Hong Kong on or after 1 July and before 10

July 1997, was already enjoying under the Basic Law (at 39C - E). This ground is affected by the Interpretation. This is because the effect of the Interpretation was that Article 22(4) qualified Article 24(2)(3) and with that qualification, unless the requirement of Mainland approval in Article 22(4) was satisfied, the person concerned could not enjoy the right of abode.

The second ground relied on by the Court was that the retrospective provision rendered the persons concerned guilty of criminal offences and was unconstitutional as contrary to article 15(1) of the International Covenant on Civil and Political Rights as applied to Hong Kong by virtue of Article 39 of the Basic Law (at 39F - 40F). This ground is not affected by the Interpretation. On the basis of this ground, the retrospective provision in section 1(2) of the No. 3 Ordinance remains invalid.

The new Schedule 1 and the new Notice

Following the Interpretation, on 16 July 1999, the Legislative Council passed a resolution under sec. 59A of the Immigration Ordinance to amend Schedule 1. The relevant amendment for this appeal is that para. 2(c) was repealed and substituted by:

"(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)."

I shall refer to this as the new para. 2(c) of Schedule 1. It contains the time of birth limitation as did the former para. 2(c).

On 16 July 1999, the Director gazetted a new Notice to replace the Notice ("the new Notice"). The new Notice is similar in substance to the former Notice. Para. A(i) is in the same terms. A Mainland resident shall apply for a certificate of entitlement through the Exit-Entry Administration of the Public Security Bureau in the district where he is residing. Para. B is similar in effect although the wording is different. It reads:

"Where a person is at the time of application residing in the Mainland of China, an application for settlement in Hong Kong made to the offices or departments of the Exit-Entry Administration of the Public Security Bureau under the laws in force in the Mainland of China, whether before or after the gazetting of this notice, may be regarded as an application for a Certificate of Entitlement or certified duplicate."

The former Notice is similar: " .... an application 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 of China for settlement in Hong Kong, ... may be regarded as an application for a Certificate of Entitlement. ....".

The operation of the original scheme

As a result of the Interpretation, the original scheme is and has since the enactment of the No. 3 Ordinance been constitutional. We now have the new para. 2(c) of Schedule 1 and the new Notice. *Ng Ka Ling* fully set out the original scheme with the relevant statutory provisions. In the earlier section headed: "*The scheme introduced in July 1997: the original scheme*", I quoted the passage in *Ng Ka Ling* (at 21) on the operation of the original scheme as it affects a Mainland resident claiming the status of permanent resident by descent.

The following features of the original scheme should be highlighted. First, a Mainland resident claiming the status of permanent resident by descent can *only* establish his status by holding a valid one way permit (i.e. the valid travel document as far as he is concerned) affixed with a certificate of entitlement. Sec. 2AA(1). (Any person holding a valid HKSAR passport or a permanent identity card, the other two documents mentioned in that provision would already have

established his right of abode.) Without it he shall be regarded as not enjoying the right of abode. Sec. 2AA(2).

Secondly, in accordance with para. A(i) of the new Notice (and formerly the Notice), a Mainland resident must apply for a certificate of entitlement through the Exit-Entry Administration of the Public Security Bureau in the district where he is residing. He cannot come to Hong Kong to make the application. If he is physically in Hong Kong, he is treated as residing in the Mainland during his stay in Hong Kong. See para. C of the new Notice (and formerly the Notice). Whilst he can appeal to the Immigration Tribunal against the Director's refusal to issue a certificate of entitlement, he cannot appeal at any time when he is in Hong Kong. Sec. 2AD(3).

Thirdly, he cannot appeal to the Immigration Tribunal against the making of a removal order on the ground that he has the right of abode. As pointed out in *Ng Ka Ling* (at 19B-C):

> "To bolster the scheme that he can only establish his status by holding a travel document affixed with a certificate of entitlement, s.53D(3) introduced by the No 3 Ordinance provides that the tribunal shall not allow an appeal against a removal order on the ground that the appellant enjoys the right of abode by virtue of the status in para.2(c) of Schedule 1 unless his status has been established in the manner prescribed by s.2AA(1)."

The policy reasons for such a scheme laid down by the legislature include the discouragement of illegal entry into Hong Kong and of illegal stay here in contravention of conditions of stay as well as the prevention as a matter of fairness of queue jumping ahead of the Mainland residents who have applied but have remained in the Mainland.

The making of removal orders

I should make some observations on the Director's power to make removal orders under section 19(1)(b)(ii), in the context of the original scheme, against claimants to the status of permanent resident by descent who are physically in Hong Kong but are treated as resident on the Mainland.

Under that provision,: "a removal order may be made against a person requiring him to leave Hong Kong .... by the Director if it appears to him that that person .... has .... landed in Hong Kong unlawfully or is contravening or has contravened a condition of stay in respect of him."

So, where a Mainland resident claiming the status came to

Hong Kong illegally or remains here in contravention of a condition of stay, the Director "may" make a removal order against him. The Director has a discretion. But that discretion has to be exercised in the context of the statutory scheme (that is, the original scheme). That scheme requires that the person concerned can only establish his status by holding a one way permit affixed with the certificate of entitlement and that he must apply for the certificate of entitlement in the Mainland through the Mainland authorities and cannot remain in Hong Kong in the meanwhile.

In the context of the original scheme, in considering the making of a removal order against a Mainland resident claiming the status, the Director, apart from being satisfied that the Mainland resident has landed in Hong Kong unlawfully or is contravening or has contravened a condition of stay, need only be satisfied in the usual case that he does not hold a one way permit affixed with a certificate of entitlement (or a valid HKSAR passport or a valid permanent identity card) as required by section 2AA(1).

Two further points should be made. First, an illegal immigrant, whether he entered illegally or has contravened a condition of

stay, does not have, as a general rule, a right to a hearing, conducted fairly and in accordance with the rules of natural justice, before a removal order is made against him. See the Court of Appeal's decisions in *R v Director of Immigration, Ex parte Chan Heung-mui* [1993] 3 HKPLR 533 and *Attorney-General v Ng Yuen-shiu* [1981] HKLR 352. In the latter case, on appeal to the Privy Council, their Lordships assumed this to be correct [1983] 2 AC 629 at 636B. A person claiming to be a permanent resident by descent who landed unlawfully or is contravening or has contravened a condition of stay is in a similar position in this regard.

Secondly, in relation to such a person the Director has no duty to consider humanitarian grounds in considering the making of a removal order against him. But he can take such grounds into account if he thinks it appropriate in the case in question. This is consistent with the position under section 13. This provides that the Director may authorize a person who landed unlawfully to remain subject to such conditions of stay as he thinks fit. It has been observed that the Director is under no duty to take humanitarian grounds into account. See the observations of Litton JA (as he then was) in *R v Director of Immigration, Ex parte Chan Heung Mui* at 543. Indeed, the Privy Council agreed in

Nguyen Tuan Cuong v Director of Immigration [1997] 1 WLR 68 at 75 with what Litton JA stated (at 545) in *Ex parte Chan Heung Mui* in relation to section 13:

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

Further, if what is suggested is that the Director should consider the exercise of some other statutory discretion (apart from sections 13 and 19) to enable such a claimant to stay in Hong Kong temporarily or permanently, the position would be similar to that under sections 13 and 19 as regards humanitarian grounds.

In the present case, as I have already noted under the earlier section headed "*the removal orders*", the applicants were not putting a case to the Director for the exercise of any discretion under section 19 or any other provision. They were concentrating on maintaining their claim to the right of abode as a matter of right.

The removal orders against the 17 applicants

The Judge upheld the removal orders. But they were quashed by the Court of Appeal. The question before us is whether the

removal orders (i) should be restored or (ii) should remain quashed.

The lower courts considered the matter on the basis that when the Director made the removal orders in question in February 1999, (i) the scheme was the modified scheme albeit unworkable at that time and (ii) the time of birth limitation had gone. However, the Court must now approach the problem from a different perspective after the Interpretation. Having regard to the conclusions reached on the Interpretation, since 1 July 1997 the time of birth limitation has been constitutional and the scheme that has prevailed since then and prevailed in February 1999 was the original scheme. But the Director did not consider the making of removal orders in such context. He considered them in the context of (i) and (ii) above. Necessarily so, since that was after the Court's judgments and well before the Interpretation.

In *R v Hull University Visitor, Ex parte Page* [1993] AC 682 at 702 B - C, Lord Browne-Wilkinson stated the test on judicial review for error of law thus:

> ".... in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law."

But "what must be shown is a relevant error of law, i.e., an error in the actual making of the decision which affected the decision itself" (at 702D - E).

That the error must be a relevant error in the above sense was put by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1064H - 1065B in these terms. After pointing out that the discretion in question was vested in the Secretary of State and that it is not for any court of law to substitute its own opinion for his, he continued:

> "but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, per Lord Greene M.R, at p. 229. ...."

The Director considered the exercise of his power to make removal orders in the context of (i) the absence of the time of birth limitation and (ii) the modified scheme, on the basis that in law that was the position at that time. That was an error. Understandably so, since he was taking the legal position after the Court's judgments but the correct legal position resulting from the Interpretation involved a valid

original scheme and a valid time of birth limitation. The critical question is whether that error of law was a relevant error.

I should first dispose of the error in law as regards the time of birth limitation. In my view, that error was not a relevant error. If no error were made, the time of birth limitation was valid and the claim to permanent resident status of a number of applicants (that is, the 12 applicants referred to in the earlier section headed "*the applicants*") could not get off the ground.

But was the error regarding the scheme that prevailed a relevant error for judicial review purposes? The power of the Director in question here is the power to make a removal order. First, this power was the same whether the context was the original scheme or the modified scheme. The two schemes have the common feature that a claimant could only establish his status as a permanent resident by descent by holding one of the documents prescribed in section 2AA(1). Leaving aside the HKSAR passport or the permanent identity card document and concentrating on the relevant document as far as such a claimant is concerned, the difference between them was that whereas the original scheme required a claimant resident on the Mainland to hold (i)

the one way permit affixed with (ii) a certificate of entitlement, the modified scheme required only (ii).

Secondly, as regards the proper exercise of the power, I have held that under the original scheme, the Director in the usual case need only ask whether the claimant holds one of the documents required by section 2AA(1), apart from being satisfied as to the precedent condition in section 19(1)(b)(ii) itself. He has no duty to consider humanitarian grounds, although he can do so. The position under the modified scheme was similar.

So, as far as the power and its proper exercise are concerned, there is no difference between the modified scheme and the original scheme. In these circumstances, the error made was not a relevant error.

The point can be made on behalf of the applicants that if when the removal orders were made, it was known that the original scheme was valid, they would have had the opportunity of putting forward humanitarian grounds. But this point cannot avail them on the present challenge to the removal orders. First, the conduct of the Director in making the decisions in question could not be impugned by

reference to the possible loss of this opportunity.

Secondly, in any event, he is under no duty and hence not bound to take humanitarian considerations into account. Assuming the applicants would have put forward humanitarian grounds, any failure by the Director would not have availed them since the Director was not bound to consider them. Lord Diplock in the passage quoted above referred to the matters which upon the construction of the statute he *ought* to have considered and excluded matters irrelevant to what he had to consider. So, for impugning a decision one is concerned with what the decision maker is bound to consider. See also *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39.

As there was not relevant error of law, the removal orders should be restored.

The Court of Appeal's judgments

The Court of Appeal quashed the removal orders. It held that in February 1999 the Director had exercised his power to remove unlawfully by simply asking whether the applicants held one of the documents required by section 2AA(1). It considered the matter in the

context that at the time the removal orders were made, the modified scheme prevailed but was unworkable and applications for certificate of entitlement could not be processed. In that extraordinary situation where there was no workable modified scheme, it held that the Director should have taken into account wider considerations both for and against the applicants.

If the modified scheme had been a workable scheme at the time, the position as regards the making of removal orders would have been similar to that under the original scheme. Even in the extraordinary situation where the modified scheme was not workable, I have considerable doubts whether the Court of Appeal was right in holding that he should have had regard to wider considerations. As the scenario involving an unworkable modified scheme is now a matter in the past, it is best to leave the judgments of the Court of Appeal to one side. I wish however to make clear that I should not be taken as approving those judgments and their reasoning.

Orders

Accordingly, the appeal by the Director is allowed. The order of the judge in the judicial review proceedings is restored and the

applicants' applications for judicial review are dismissed. The order of the judge in the habeas corpus proceedings is restored and the writs of habeas corpus issued in respect of the applicants are discharged.

As to costs, as suggested by Mr Ma SC for the Director, there should be no order as to costs save that the 17 applicants' (that is, the respondents') costs be taxed in accordance with Legal Aid Regulations.

Pursuant to the undertakings given to the Court set out in the earlier section headed "*Director's position following outcome of this appeal*", the Director will be considering whether to revoke the removal orders. There are special circumstances relating to the 17 applicants. They arrived before the Court's judgments on 29 January 1999 and except for two of them, they allegedly made their claims before then. Further, they may be able to rely on events subsequent to the making of the removal orders. The Director will no doubt consider these 17 applicants with such sympathy as they deserve, bearing in mind their special circumstances.

Mr Justice Litton PJ:

I agree with the Chief Justice's judgment, and likewise with Mr Justice Ching PJ's. I also agree with Sir Anthony Mason NPJ's observations on the Interpretation.

The Court of Appeal held that the removal orders made in February 1999 in respect of the 17 applicants were unlawful: Not because the Director did not have the lawful authority to do so under s.19(1)(b)(ii) of the Immigration Ordinance nor because the circumstances specified in that section did not apply, but because the decision-making process was flawed. He had, according to the Court of Appeal, failed to take into account relevant matters and this vitiated the entire decision-making process, resulting in that court reversing the trial judge (Mr Justice Yeung) and quashing the removal orders.

The application for relief under Order 53 r.3

To consider whether the Court of Appeal had erred, it is necessary to go back to the beginning: To the application for leave to apply for judicial review made under Order 53 r.3 of the Rules of the High Court. It is a long and rambling document consisting of, originally, 41 paragraphs: It has since been amended to add considerably more paragraphs. In so far as it is possible to identify in that document the

grounds on which, ultimately, the Court of Appeal based its decision to quash the removal orders, it is, as stated in the application, "*Wednesbury* unreasonableness": the second of the three grounds stated by Lord Diplock in his classic speech in the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374 at 410. This was a shorthand way of expressing Lord Greene MR's well-known proposition in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 at 229 to this effect:

> "... a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, as is often said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* [1926] Ch. 66 at 90 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

The threshold for the court's intervention under this ground, as the courts have repeatedly said, is necessarily high. Where a departmental head of government is entrusted by the legislature with administrative responsibilities it is not for the courts to say how those responsibilities should be discharged. It is only where the administrator has acted beyond the range of responses reasonably open to him under the

statutory scheme that the court's power of intervention under s.21I of the High Court Ordinance, Cap. 4, can properly be involked.

The situations adumbrated in Lord Greene MR's judgment, as quoted above, range over a wide spectrum. Since 1947 when the *Wednesbury Corporation* case was decided the proposition has been refined. It is impossible to set out all the cases decided on *Wednesbury* principles since that time. At one end of the spectrum is a case like *R. v. Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386 [The Pergau dam case] where the Divisional Court in acceding to the application for judicial review found that the Minister, when he purported to exercise power conferred by statute, had taken into account considerations outside the scope of the statute. The case turned on the proper construction of s.1(1) of the Overseas Development and Cooperation Act 1980 of the United Kingdom which authorised the Secretary of State to give overseas assistance *for the purpose of promoting development* of an overseas territory or the welfare of its people: The project to be funded, the Pergau dam hydro-electric project in Malaysia, was not economically sound: That was conceded: But the Secretary of State contended that there were wider political and economic considerations to be taken into account in

deciding to give financial assistance to Malaysia, including the fulfilment of an undertaking given by the former Prime Minister a few years before. The Divisional Court held that the Secretary of State had gone outside the statutory *purpose*: That of promoting development overseas. The case falls more comfortably into the category of "illegality" rather than that of "*Wednesbury* unreasonableness" so-called.

At the other end of the spectrum are those instances, often asserted but seldom with success, of administrators whose decisions in themselves are said to be "*Wednesbury* unreasonable": Lord Diplock in *Council of Civil Service Unions* at 410 spoke of them as decisions "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." In more homely language Henry LJ in *R. v. Lord Chancellor, ex p. Maxwell* [1996] 4 AER 751 at 756a referred to these decisions which warrant interference as ones which "jump off the page at you". None of the three judgments in the Court of Appeal referred in terms to "*Wednesbury* unreasonableness", but the applicants in their printed case seek to justify that court's decision on that ground. They say that in the circumstance where there was, in February 1999, no operable scheme whereby an application could have been made for a

certificate of entitlement, it was "*Wednesbury* unreasonable" to rely on the absence of the certificate to decide on removal. If, by this, the applicants meant that, in the circumstances prevailing (in what Nazareth V-P in his judgment called "the interregnum"), it was "outrageous" to have overstayers and illegal migrants removed, they failed in the Court of Appeal. The Court of Appeal did not quash the removal orders on this ground. What, then, was the basis upon which that court *did* quash the removal orders? One would look in vain to the application lodged under Order 53 r.3 for an answer.

The Director's power of removal

No administrator ever exercises power in a vacuum. It is always done in the context of a statutory scheme, a legislative frame-work. As the Chief Justice has remarked in his judgment, the policy reasons laid down by the legislature in enacting Immigration (Amendment) Ordinances No. 2 and 3 included the discouragement of illegal entry into Hong Kong and of illegal stay here in contravention of conditions of stay, as well as the prevention of queue-jumping ahead of Mainland residents who have applied for certificates of entitlement but have not broken the law.

What the Director had in February 1999, underpinning his exercise of power under s.19(1)(b)(ii), was an incomplete statutory scheme. He was faced with applicants *claiming* to be permanent residents; but they were in fact Mainland residents with no certificates of entitlement and were illegally in Hong Kong. The scheme introduced by the No. 3 Ordinance was incomplete only to this extent: We had in *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 declared as unconstitutional the provisions in that Ordinance in so far as they required permanent residents of the Hong Kong SAR to hold one-way permits issued by the Mainland authorities before they could enjoy the right of abode. We were at pains to emphasize that the provisions in Ordinance No. 3 for *verification* of a person's claim to be a permanent resident remained intact. There were provisions in Part 1B of the Immigration Ordinance, governing the exercise of the Director's functions and duties relating to persons claiming to be permanent residents by descent under paragraph 2(c) of Schedule 1, which survived the constitutional challenge in *Ng Ka Ling*. Section 2AA(1), as excised by this Court's judgment, reads:

"**2AA Establishing statutes of permanent resident under paragraph 2(c) of Schedule 1**

(1) A person's status as a permanent resident of the Hong Kong Special Administrative Region under para 2(c) of Schedule 1 can only be established by his holding of:

(a) a valid certificate of entitlement issued to him"

This was not a provision the Director could ignore. The statutory requirement that the status as a permanent resident could *only* be established by holding a certificate of entitlement is wholly incompatible with what the applicants claim in their application for judicial review: A declaration that they are permanent residents with the right of abode and entitled not to have removal orders made against them.

Whilst it is true that in February 1999 there was no procedure in place whereby a person claiming a right of abode under Part 1B could in fact have made an application for a certificate of entitlement, this did not mean that the Director's exercise of lawful power under s.19(1)(b)(ii) was at large. Whether there was a full scheme in place or not, the applicants had no right to remain in Hong Kong. In the exercise of his power of removal the Director had obviously to bear in mind the policy of the legislature under Part 1B: the scheme for the orderly entry of permanent residents and the discouragement of illegal entry and stay. The fact that part of the machinery had broken down did not mean that

the power of removal was not governed by statute. The absence of a workable scheme in February 1999 meant simply that, at that time, residents in the Mainland claiming the status of permanent residents were unable to put forward their claim: This did not amount *per se* to the deprivation of a core right guaranteed by the Basic Law.

It is of some significance to note that, in their applications for relief under Order 53 r3 of the Rules of the High Court, the applicants had sought an order of *mandamus* requiring the Director to "specify by a notice in the Gazette the manner in which a person who is not overseas or not in Macau or Taiwan and who claims to be a permanent resident under paragraph 2(c) of Schedule 1 Immigration Ordinance might apply under section 2AB(1) for a certificate of entitlement ...". This is directed to the absence of a workable scheme following *Ng Ka Ling*: not to the legality of the exercise of power under s.19(1)(b)(ii). It failed *in limine* and was not pursued on appeal. It must be assumed therefore that, in the Court of Appeal, the applicants were no longer maintaining that the Director was under the duty as alleged.

The Court of Appeal

It is not easy to extract from the three judgments of the Court of Appeal the *ratio decidendi* for the decision to quash the removal orders.

All three judges concluded that the power of removal under s.19(1)(b)(ii) was a *discretionary* power: Rightly so: Section 19(1) says "A removal order *may* be made against a person requiring him to leave Hong Kong ... etc": This means that the Director has a discretion *not* to order removal even if the conditions in subsection (b)(ii) are satisfied. This is right as far as it goes. But in the context of the removal of a person falling within Part 1B of the Immigration Ordinance the Director must have regard to the overall objective of the statutory scheme. As mentioned earlier, the provisions of s.2AA(2) remained in place after this Court's judgment in *Ng Ka Ling*.

Likewise s.2AB(5) which says:

> "(5) For the removal of doubt, it is hereby declared that the making of an application under subsection (1) does not give the applicant the right of abode or right to land or remain in Hong Kong pending the decision of the Director on the application."

The intention of the legislature could not have been clearer. It was not for the Director to frustrate that intention.

Mr Justice Chan CJHC in considering the Director's exercise of discretionary power to remove under s.19(1)(b)(ii) said that the Director might have to take into account "policy matters such as the number of possible applications" and whether the applicants had come illegally or had remained in breach of conditions of stay and the "integrity of the statutory scheme". And he added:

> "If the Director decides to allow every such applicant to remain in Hong Kong pending verification of his claim, this may encourage other people, whether they are genuine applicants or not, to come to Hong Kong by every possible means, whether legal or illegal. In that case, the whole certificate of entitlement scheme will break down. This would also defeat the purpose of an orderly settlement in Hong Kong of persons residing in the Mainland who fall within the third category of Article 24(2)."

All of this seems to argue strongly for a decision to remove.

The applicants had not put forward any ground for remaining in Hong Kong other than a right to remain. Once it was clear that they had no such right, since they did not have certificates of entitlement issued to them, what possible grounds remained for impeaching the Director's decision? The Chief Judge in his judgment spoke of "the

nature" of the applicants' claims, the "quality of the supporting material" and the Director's failure to consider such material: But this is to say, in effect, that the Director had a *duty* to consider the material. What material? And more importantly, wherein lies that duty? The Chief Judge seems to have found the duty in the Basic Law itself: In parts of his judgment he spoke of the Director's duty "to implement the Basic Law".

This is a misapprehension of the constitutional position. The Basic Law is the constitutional framework for the Hong Kong SAR. All statutes passed by the legislature must be consistent with that framework. By its very nature, the definition of functions and responsibilities in the Basic Law is stated in broad and general terms. Administrators function within the confines of their particular statutes. Hence, the question as to the factors which an administrator is bound to take into account in exercising a statutory power is determined generally by construing the statute which conferred the power. It would be a rare case indeed where, in administrative law terms, there is such a gap in the statutory framework that the exercise of power has to be judged, not by construing the relevant statute, but by the Basic Law itself. The present is not such a case. In this regard the Chief Judge erred.

Nazareth V-P appears to have taken a slightly different approach to that of the Chief Judge. He did not identify the source of the Director's duty but said nevertheless that there was a duty "to have regard to all relevant matters": This, the learned Vice-President said, should result in at least *some* persons not being removed: That is, those cases where the applicants' status could be "readily verified without the sort of effort or delay that would be unreasonable in the circumstances". The learned Vice-President added:

> "If the claim can be easily determined in a matter of days, it is difficult to see how removal before that is accomplished could be right. Conversely, if the claim is going to take months, it is equally not difficult to see why removal of such a person, whose entitlement to permanent resident status is not verified but only claimed, should not be reasonable."

The learned Vice-President did not explain how, faced with hundreds or perhaps thousands of "applications", the Director and his staff might distinguish between those which could be "easily determined in a matter of days" from those which required months of effort, without a fairly sophisticated system in place. This was, in effect, to impose upon the Director an administrative framework of the court's making: Until such system was in place, no removal order could lawfully be made in respect of persons coming within Part 1B of the Ordinance. Nowhere

in the Immigration Ordinance can such a fetter on the exercise of power under s.19(1)(b)(ii) be found, expressly or by implication.

This point needs emphasis : In proceedings for judicial review, the ground of failure to take into account a relevant consideration can only be made out if the decision-maker has failed to take into account a consideration which he is *bound* to take into account in making that decision : see Mason J in *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39. What factors he is bound to take into account is determined by construing the statute conferring the power. If an administrator misconstrues a statute and asks himself the wrong question, or fails to ask himself the right question, the Court can properly intervene and quash his decision on the ground of illegality. But that question must be clearly identified: A vague statement pointing to "all relevant matters" is not enough.

When counsel asks: "Is the Director entitled to throw the applications into the waste-paper basket?", that is simply using a figure of speech. It obscures the reality on the ground. The Director is faced with a situation of mass applications, not simply a handful of envelopes where his officers have the time and leisure to examine the individual

contents. It requires the setting up of procedures so that his officers can handle them effectively. If the Director, as the person ultimately responsible for administering the statutory scheme under the Immigration Ordinance, has a *duty* to consider humanitarian grounds, then he will have to establish internal guidelines for his officers. The expression "strong humanitarian grounds" has been used repeatedly in the course of argument: But where in the legal framework within which the Director operates does one find a duty to consider strong humanitarian grounds? And is there a distinction between *strong* humanitarian grounds and humanitarian grounds simpliciter? The Chief Judge found such a duty in the Basic Law: A finding which is unsound. Nazareth V-P never sought to identify the source of that duty.

Mortimer V-P appears to have adopted a similar approach to that of the Chief Judge. He said that, in the absence of a complete scheme for dealing with applications for certificates of entitlement, the Director "must at least consider the evidence which that person seeks to put before him in support of the claim. Failure to do so renders the decision unlawful ... *The authority for such an enquiry by the Director rests within Article 24 [of the Basic Law] itself*'. [Emphasis added]. For reasons which I have earlier put forward this approach is unsound.

Discipline of law

The limited role of the Court in exercising its supervisory responsibilities under s.21I of the High Court Ordinance must constantly be borne in mind. A crucial aspect of the rule of law in Hong Kong is that administrators exercise their functions and duties within the law. To do so, the law must be clear. Where a statute in express terms requires a decision-maker to take into account certain factors and an applicant can show that he has failed to do so, that is one ground for judicial review. *Certiorari* may issue, depending on the importance of the factor omitted: It may be so insignificant that the failure to take it into account could not have materially affected the decision. Otherwise, the decision may properly be impugned. But where the conditions governing the exercise of power are satisfied, to seek to impeach the decision nevertheless is a very different matter. It brings the decision-maker within the area of an *abuse of power*: The power is undoubtedly there, but it has been *improperly exercised.* If the court is to intervene, it can only do so on clearly stated grounds. That is why Order 53 r.3(2)(a) of the Rules of the High Court governing judicial review proceedings is stated in mandatory terms: An application for leave must be made by filing a notice in Form 86A containing a statement of the *grounds* upon which it

is sought. This makes for good administration under the rule of law. If the decision-making process is vitiated by the administrator's failure to take some factor or another into account, those factors must be clearly identified, so that the next time round the decision-maker would not offend again. These are basic propositions, but failure to bear them firmly in mind led the Court of Appeal into error.

The Court of Appeal was persuaded to quash the removal orders because a number of factors relevant to the decision-making process were not considered by the Director. But these were put in vague and general terms in the three judgments. They bear little relationship to the grounds stated in the formal application lodged by the applicants purportedly in compliance with Order 53 r.3. The application itself, containing the "grounds" on which relief was sought, as amended, numbers well over 50 paragraphs. Paragraphs 37 and 41 have been augmented and subdivided into separate paragraphs by amendment. Even in its unamended form the application should have alerted the judge dealing with ex parte leave to the possibility that there was something flawed in the process. No system of administrative law can operate in the amorphous way seen in this case. Grounds for quashing the exercise of administrative power by the court if well-founded should be capable of

being stated clearly and succinctly, in a few numbered paragraphs. I would emphasize the word *few*. Once leave to apply for judicial review is granted, amendment of the grounds should rarely occur. All too often applications are made for amendment after leave to issue proceedings has been granted, as if Order 53 r.3 were simply the portals to a playground of infinite possibilities where the administrators could then be made to leap through more and more hoops of fire. It is up to the judges of the High Court to stop this kind of extravaganza.

What has happened in this case is simply this: The discipline of law and of legal procedures broke down in the lower courts. The proceedings in the Court of Appeal became an academic discourse.

It is to be hoped that nothing similar will be seen again in this Court.

Conclusion

In my judgment the Court of Appeal has clearly erred in reversing Yeung J. I agree with the orders proposed by the Chief Justice.

Mr Justice Ching PJ:

I have had the advantage of reading the judgment of the Chief Justice in draft form. I, too, would uphold this appeal for the reasons set out by the Chief Justice and i would only add the following brief comments.

I am in no doubt but that the Standing Committee of the National People's Congress had power to make the interpretation which it did on 26 June 1999. It was the exercise of the power vested in it by Article 67(4) of the Chinese Constitution. That power is repeated in the first paragraph of Article 158 of the Basic Law with express reference to that law. Nowhere is there any provision by which it divested itself of that power or by which it assigned that power to this or any other Court. Instead, the second paragraph of the Article authorised the Courts of Hong Kong in adjudicating cases 'to interpret on their own ... the provisions of this law which are within the limits of the autonomy of the region.' The authorisation is therefore limited in scope. The third paragraph of the Article then requires the Courts in Hong Kong, when adjudicating cases where it is necessary to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the Central

People's Government or concerning the relationship between the Central Authorities and Hong Kong, to seek an interpretation of the relevant provisions before making a final judgment which is not appealable. This paragraph does not purport to bestow any power upon the Standing Committee. That would have been unnecessary since the relevant power was already vested in it. Instead, the Article placed a duty upon the Courts in Hong Kong to seek an interpretation when the circumstances so required.

I am equally in no doubt that the Interpretation took effect as from 1 July 1997. In making it, the Standing Committee did not purport to act, and has never purported to act, as a Court. Nor did it purport to be amending the law. It was doing exactly what it said it was doing, namely interpreting the law. That must mean that they were explaining what the law is and has been since the Basic Law came into effect.

I am in agreement with the Chief Justice that the Interpretation means that as from 1 July 1997, so far as relevant to the arguments put forward to us, 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. The difference

between that and what was laid down by this Court is the requirement for the one-way permit. In the period between our judgment (29 January 1999) and the Interpretation (26 June 1999) there was no system in place by which application could be made for a certificate of entitlement.

As a matter of law the position is clear. The respondents had either entered Hong Kong illegally or had stayed in Hong Kong in breach of the conditions upon which they were permitted to enter. They had no legal claim to stay. Whatever scheme for an application for a certificate of entitlement was or was not in place, they had no legal claim to remain in Hong Kong. The Director was therefore justified, as a matter of law, in making the removal orders under section 19(1)(b) of the Immigration Ordinance, Cap. 115. This would have been so whether the orders had been made before our judgment, after our judgment up to the Interpretation or after the Interpretation. The respondents, in these circumstances can only rely upon an exercise of discretion by the Director in their favour. They cannot succeed on that basis. First, given that such a discretion exists, no appeal was made to the Director to exercise it in their favour. It is for a person seeking an indulgence to persuade the relevant authority to give it to him. It is not for the authority to embark upon an enquiry as to whether or not or, if so, how he

should exercise it. Secondly, there is clear authority, cited by the Chief Justice, that although the discretion may exist the Director is not bound to exercise it. Thirdly, even if it be shown that the Director ought to have exercised his discretion and in so doing refused or neglected to take into consideration the changes in the law between 29 January 1999 and 26 June 1999 that would have made no difference.

I would uphold the appeal but, at the request of the appellant make no order as to costs save that the respondents' costs be taxed under the Legal Aid Regulations. I agree with the orders proposed by the Chief Justice.

Mr Justice Bokhary PJ:

As to the Standing Committee of the National People's Congress's Interpretation of 26 June 1999 ("the Interpretation"), I agree —and confine myself to saying that I agree—that it has the effect in law stated by the Chief Justice and Sir Anthony Mason NPJ.

Turning to the Court of Appeal's judgment in the present case, I say at once that I fully recognize the great care which the learned

judges of that court took in deciding what ought to be done in the situation facing them. But there is now no need to pronounce on whether they were right or wrong in law on the basis of the understanding of the position prevailing at the time of their judgment.

What now matters is as follows. The removal orders made by the Director of Immigration in the present case were made between the time of this Court's judgments of 29 January 1999 in *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 and *Chan Kam Nga v. Director of Immigration* (1999) 2 HKCFAR 82 and the time of the Interpretation five months later. That being so, it was not possible for the Director, when making the removal orders, to "understand correctly the law that regulates his decision-making power [so as to] give effect to it". The words which I have just quoted are those used by Lord Diplock in *CCSU v. Minister for Civil Service* [1985] AC 374 at p.410F when identifying the first duty of an administrative decision-maker. Accordingly the removal orders in question have been vitiated by the operation of classic judicial review principles fundamental to the preservation of the rule of law.

It is true that the position under the Interpretation is less

favourable to the applicants than was the position as it was understood to be at the time when the removal orders were made. But that places no real impediment in the applicants' path. If they had proceeded on the basis of what the Interpretation says, they would undoubtedly have applied to the Director on humanitarian grounds to exercise his discretion not to make removal orders against them.

It would be sufficient for the applicants' purposes in the present appeal if humanity was a consideration which the Director had to take into account. As it happens, it is even more. Humanity is the application. To ignore it would be exactly the same as throwing the applications into the wastepaper basket unread. The Director would not have been entitled to do that. And in fairness to him, I feel bound to make it clear that I cannot imagine that he would have dreamt of doing anything of the kind. For that would have been a wholesale abandonment of his undoubted duty to exercise his statutory powers fairly and properly.

I cannot improve on how Prof. Jeffrey Jowell QC puts it in his recent article "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] PL Autumn 448. He powerfully points out (at

p.460) that "the powers intended by a legislative scheme ... must not be construed in a vacuum", that it is necessary "to identify the underlying principles which should govern the decision in question" and that:

> "To this end the general notions of fairness that may reside in the common law may prove helpful, but it is more helpful still to engage openly with the necessary qualities of a modern constitutional democracy."

That approach is, as I see it, by far the most likely one to secure the general public's understanding of, and support for, the rule of law as a practical concept in people's daily lives. The reality is as John Austin portrayed it (in "Lectures on Jurisprudence or the Philosophy of Positive Law", ed. Robert Campbell, 5th ed. (1885), vol. 1,p. 485) when he said that: "The conduct of nineteen men out of twenty, in nineteen cases out of twenty, is rather guided by a surmise as to the law, than by a knowledge of it." And that surmise must surely be based essentially on their appreciation of the qualities of the society in which they live.

In Hong Kong where we aspire to be humane as well as orderly, it is plain that the Director would have been duty-bound at least to read the applications to see if they or any one or more of them disclosed a strong and obvious case for a favourable exercise on humanitarian grounds of his discretion. By a "strong" case, I mean one

which stands out even among so many other cases deserving sympathy. By an "obvious" case, I mean one where the material facts are clear or easily verifiable.

It is true that even where an administrative decision has been vitiated by a failure on the part of the decision-maker to understand correctly the law regulating his decision-making power, the courts may nevertheless in certain circumstances decline to quash that decision. Thus they may so decline if it can be seen that the same decision would inevitably have been made even upon a correct understanding and application of the relevant law. This "inevitability" test was endorsed by the Privy Council in *Nguyen Tuan Cuong v. Director of Immigration* [1997] 1 WLR 68 at p.77B. In my view, it cannot be said that the removal orders were inevitable. For no open-minded person would attempt to say for certain what the result would have been if humanitarian applications had been made and considered.

I would dismiss these appeals by the Director. For in my judgment, these removal orders should remain quashed. That is how I see the law. That would leave the Director in a position to consider— with the benefit of legal advice in the context of the up-to-date situation

and untrammeled by previous removal orders—whether or not to make fresh removal orders. Perhaps he would not make any. But if my view of the law does not prevail and the removal orders are restored, then I can only emphatically express the hope that the applicants' cases for revocation will receive the sympathetic consideration called for by their special circumstances.

Sir Anthony Mason NPJ:

I agree with the reasons for judgment of the Chief Justice. In the light of the importance of the cases and the novelty of the issues, it is appropriate that I state in my own words the basis of my thinking on some issues. The comments which follow are not intended to qualify in any way my agreement with the Chief Justice's reasons.

The power to make an Interpretation and its binding effect

The Basic Law is the constitution of the Hong Kong Special Administrative Region of the People's Republic of China established under the principle of "one country, two systems". It is a national law of the PRC, being an enactment of the National People's Congress made in the exercise of legislative powers conferred upon the NPC by the PRC

Constitution.

Article 8 of the Basic Law preserves the common law in Hong Kong, Article 80 vests the judicial power in the courts of the Region and Article 81 maintains the judicial system previously practised in Hong Kong except for changes consequent upon the establishment of the Court of Final Appeal of the HKSAR. Article 81 is followed by Article 82 which vests the power of final adjudication in the Region in the Court of Final Appeal. By these and other provisions, the Basic Law maintains the common law and a common law judicial system in the Region. This conjunction of a common law system under a national law within the larger framework of Chinese constitutional law is a fundamental aspect of the principle of "one country, two systems" which is recited in the Preamble to the Basic Law.

As is the case with constitutional divisions of power, a link between the courts of the Region and the institutions of the People's Republic of China is required. In a nation-wide common law system, the link would normally be between the regional courts and the national constitutional court or the national supreme court. Here, however, there are not only two different systems, but also two different legal systems.

In the context of "one country, two systems", Article 158 of the Basic Law provides a very different link. That is because the Article, in conformity with Article 67(4) of the PRC Constitution, vests the general power of interpretation of the Basic Law, not in the People's Supreme Court or the national courts, but in the NPC Standing Committee.

Consistently with that vesting of the general power of interpretation in the Standing Committee, the Standing Committee authorizes the courts of the Region to interpret "on their own, in adjudicating cases" the provisions of the Basic Law which are within the limits of the autonomy of the Region. The expression "on their own" stands in contrast to the mandatory reference requirement under Article 158(3) which applies to the Court of Final Appeal in relation to what the Chief Justice calls "the excluded provisions".

The expression "in adjudicating cases" is of particular significance. In the common law world, these words would be surplusage. Interpretation of a law, even of a constitution, is the business of the courts, being an incident of the adjudication of cases. In the People's Republic of China, however, under Article 67(4), the Standing Committee of the NPC exercises, as well as other functions and

powers, the power "to interpret laws", because the PRC Constitution does not provide for a separation of powers that is the same as or similar to the common law doctrine of the separation of powers. Article 57 of the PRC Constitution provides that the NPC is the highest organ of state power and the NPCSC is its permanent body.

The Standing Committee's power to interpret laws is necessarily exercised from time to time otherwise than in the adjudication of cases. So the expression "in adjudicating cases" makes it clear that the power of interpretation enjoyed by the courts of the Region is limited in that way and differs from the general and free-standing power of interpretation enjoyed by the Standing Committee under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law.

This conclusion may seem strange to a common lawyer but, in my view, it follows inevitably from a consideration of the text and structure of Article 158, viewed in the light of the context of the Basic Law and its character as the constitution for the HKSAR embodied in a national law enacted by the PRC.

This conclusion on the power of the Standing Committee to

interpret under Article 158(1), as the Chief Justice points out, gains some support from Professor Yash Ghai's work : "Hong Kong's New Constitutional Order" (2nd ed 1999) p. 198. There the author concluded that the Standing Committee has a general power to interpret the Basic Law. The power is "plenary in that it covers all the provisions of the Basic Law; this power may be exercised in the absence of litigation."

In argument, it was submitted that the last two sentences of Art. 158(3) support a different conclusion, namely that the Standing Committee's power of interpretation is confined to matters referred to it by the Court of Final Appeal. The argument is that the last two sentences are confined to an interpretation given on such a reference and that is significant because the penultimate sentence requires the courts of the Region to follow that interpretation and the last sentence states that "judgments previously rendered shall not be affected". The absence of similar provisions in relation to an interpretation by the Standing Committee otherwise than on a reference, so the argument runs, suggests the absence of such a power, that being a conclusion which, speaking generally, might appeal to a common lawyer.

In may view, the suggested conclusion does not follow from

the matters on which it is based. The general power of interpretation of the Basic Law vested in the Standing Committee by Article 158(1) is plainly a power to give an authoritative interpretation of the Basic Law binding on all institutions in the Region. There was no occasion to spell out the obvious in the Basic Law. Nonetheless it may have seemed desirable to make specific provision for what was to happen when an interpretation is to be given on a reference, in order to make clear beyond any doubt, the effect the Interpretation would have when it was returned to the Court of Final Appeal on the reference, and to ensure that it was the interpretation of the Standing Committee rather than the Court's judgment applying the interpretation that would have authoritative force. The penultimate sentence, it will be noted, is directed to "the courts of the Region" not simply to the Court of Final Appeal.

As to the effect of a free-standing interpretation by the Standing Committee, that is, an interpretation given otherwise than on a reference, judgments previously given are protected by the vesting of judicial power in the courts of the Region and the vesting of the power of final adjudication in the Court of Final Appeal. Under the common law, a final judgment would not be re-opened as between the parties to the litigation in which the judgment was delivered by reason of the

subsequent adoption of a new interpretation of the relevant legal instrument.

I conclude the discussion of this point by observing that, although the Interpretation is made by the Standing Committee, the permanent body of the NPC, which is the highest organ of state of power and exercises legislative power, the Interpretation is not *simply* legislation, as an amendment to the Basic Law would be. It is expressed to be an Interpretation and to state "the legislative intent" of the Basic Law in a way that differs from the view taken by the Court in *Ng Ka Ling*. It satisfies the requirements of Article 158(1) so that it is an "interpretation" within the meaning of that provision with the consequences that attach to such an interpretation.

The actual effect of the interpretation

On this question, there is no occasion for me to add to the reasoning of the Chief Justice except to emphasize the point that, although Clause 1 is expressed to be an interpretation of Article 22(4), not of Article 24, the Clause is clearly linked to Article 24, the very purpose of the Interpretation being to displace the construction placed on the two Articles in *Ng Ka Ling*.

The form in which the Interpretation is expressed is no doubt a reflection of the Standing Committee's view, expressed in the preamble to the Interpretation, that the Court of Final Appeal in *Ng Ka Ling* should have referred the interpretation of Article 22(4), an "excluded provision", to the Standing Committee under the mandatory requirement of article 158(3) of the Basic Law. In *Ng Ka Ling*, this Court saw the critical question as one which involved the interpretation or inter-action of Articles 22(4) and 24(2) and applied the "predominant test". The Standing Committee, however, has simply focussed on the interpretation of the excluded provision, Article 22(4), and has issued the Interpretation of that provision which necessarily impacts upon, and has consequences for, Article 24(2). What this means for the mandatory reference requirement is not a matter which arises for consideration in this case.

The challenge to the Director's decisions

The effect of the Interpretation in speaking to the meaning of the Basic Law, as it has operated from the time of its commencement, has the consequence that the Director misapprehended, through no fault of his own, the law, that is, the legislative scheme. But that misapprehension was not an error of law which affected his decisions to make orders for

removal. The validation of the entire legislative scheme by the Interpretation did not affect the legality or the relevance of the grounds on which the orders were made.

Had the applicants and the Director appreciated that the legislative scheme was valid in its entirety, the applicants might well have asked the Director to refuse, on discretionary grounds, to make removal orders. If the Director were under an enforceable duty to take account of discretionary considerations, then it might be said that he failed to take account of considerations relevant to the making of his decisions with the consequence that they were vitiated.

However, as the Chief Justice has pointed out, there is no enforceable duty imposed by the Ordinance to take account of discretionary considerations. The Director can have regard to them, if he so chooses, but he is at liberty to disregard them. The fact that there is no enforceable duty to take account of them means that disregarding them cannot constitute an error of law : *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39.

It follows that the Director made no error of law in failing to

take account of discretionary considerations, assuming that there was such a failure on his part, a question which has been left unresolved. In this respect, it should be noted that the Director was not asked to take account of such matters, the applicants then being concerned to establish their claimed right of abode.

In the events which happened the Director made no relevant error of law and as relevant error on the part of the decision-maker that affects his decision is the foundation of relief by way of judicial review, the applicants' case must fail.

The applicants sought to overcome this obstacle by drawing upon the speeches in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 to support the proposition that a change in the law, operating retrospectively, cannot alter historical facts. So much may be accepted. In that case, an alteration in the law, as it was then understood to be, brought about by judicial decision, did not convert a payment, which was not made under mistake of law when the payment was made, into a payment made under a mistake of law. That was because it was the payer's mind at the time of payment that was relevant. There is, however, no parallel between such a case and making of an

administrative decision the validity of which depends upon the application to it of the applicable law, even if it is a law whose true import is ascertained or declared after the making of the decision.

In the final analysis the most that can be said is that the applicants, as a result of the Standing Committee's Interpretation, have lost a possible opportunity of advancing a case based on discretionary considerations, which they might have advanced had the effect of the Interpretation been known before the removal orders came to be made. Although the applicants could not reasonably be expected at that time to act on the possibility that such an interpretation would issue - an expectation that would be attributed to them in the case of an interpretation issued by an appellate court in a common law system - for reasons already stated that circumstance does not give rise to relief for error of law on the arguments presented on the applicants' behalf.

Even if the loss of a relevant opportunity were to be seen as amounting to an injustice, brought about by a change in the law operating with effect from 1 July 1997, that loss does not fall within an established ground for relief. Under the common law as it presently stands, loss of an opportunity to advance a case attracts relief when it proceeds from a

denial of natural justice on the part of the decision-maker but there was no denial of natural justice by the decision-maker here. Furthermore, there is no legal basis in this case for attributing to the Director the loss of such an opportunity.

The undertaking, offered by Mr Ma SC on behalf of the Director, to consider revocation of the removal orders addresses this problem among others and will enable the Director to take account of discretionary considerations, if he is so minded.

Chief Justice Li:

The Court is unanimous in its conclusions on the Interpretation. These have been summarised in my judgment in the section headed "*Summary of views on Interpretation*".

The Court, by majority (Mr Justice Bokhary PJ dissenting), allows the appeal by the Director. By such majority: (1) The order of the judge in the judicial review proceedings is restored and the applicants' applications for judicial review are dismissed. (2) The order of the judge in the habeas corpus proceedings is restored and the writs of

habeas corpus issued in respect of the applicants are discharged. (3) There should be no order as to costs save that the applicants' (that is, the respondents') costs be taxed in accordance with Legal Aid Regulations.

With these orders, the Director's undertakings to the Court are effective. These have been set out in my judgment in the section headed "*Director's position following outcome of this appeal*".

(Andrew Li)
Chief Justice

(Henry Litton)
Permanent Judge

(Charles Ching)
Permanent Judge

(Kemal Bokhary)
Permanent Judge

(Anthony Mason)
Non-Permanent Judge

Mr Geoffrey Ma SC and Mr Joseph Fok SC (instructed by the Department of Justice) for the Appellant

Mr Denis Chang SC, Ms Gladys Li SC and Ms Margaret Ng (instructed by M/s Pam Baker and Company and assigned by the Director of Legal Aid) for the Respondents