

IN THE PRIVY COUNCIL

No.16 of 1982

ON APPEAL
FROM THE COURT OF APPEAL HONG KONG

B E T W E E N :

THE ATTORNEY GENERAL

Appellant
(Respondent)

- and -

NG YUEN SHIU also known
as NG KAM SHING

Respondent
(Applicant)

(and CROSS-APPEAL)

RECORD OF PROCEEDINGS

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Respondent

7/83

O N A P P E A L
FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

THE ATTORNEY GENERAL Appellant
(Respondent)

- and -

NG YUEN SHIU also known Respondent
(Applicant)
as NG KAM SHING

(and CROSS-APPEAL)

RECORD OF PROCEEDINGS

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O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

THE ATTORNEY GENERAL

Appellant
(Respondent)

- and -

NG YUEN SHIU also known as
NG KAM SHING

Respondent
(Applicant)

10

(and CROSS-APPEAL)

RECORD OF PROCEEDINGS

No. 1

WRIT OF HABEAS CORPUS
AD SUBJICIENDUM

No.1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

In the
Supreme Court

No.1
Writ of
Habeas Corpus
Ad Subjiciendum

6th November
1980

MISCELLANEOUS PROCEEDINGS

20

ELIZABETH THE SECOND, by the Grace of God,
of the United Kingdom of Great Britain and
Northern Ireland and of Our other realms and
territories Queen, Head of the Commonwealth,
Defender of the Faith, to the Commissioner of
Prison at Victoria Remand Centre, Old Bailey
Street, Central, Hong Kong.

30

We command you that you have in our High
Court of Justice at the Battery Path, on the day
and at the time specified in the notice served
with this writ, the body of Ng Yuen Shiu being
taken and detained under your custody as is said,
together with the day and cause of his being taken

In the
Supreme Court

No.1
Writ of
Habeas Corpus
Ad Subjiciendum
6th November
1980
(continued)

and detained, by whatsoever name he may be called therein that our court may then and there examine and determine whether such cause is legal, and have you there then this writ.

Witness The Honourable Sir Denys Roberts,
Chief Justice of Our said Court, the 6th day
of November, 1980.

Indorsement

By order of Mr. Justice Rhind of Supreme Court,
Hong Kong.

10

This writ was issued by Kwan & Kwan
solicitors for the Applicant, Ng Yuen Shiu.

I acknowledge receipt of a sealed copy
of a writ of habeas corpus which has been
handed to the Chief Immigration Officer Cheuk
Koon-Cham for action.

Sd: J.W.Grant
Assistant Superintendent
for Commissioner of Prisons
6th November, 1980

20

No.2
Notice to be
served with
Writ of Habeas
Corpus Ad
Subjiciendum
6th November
1980

No. 2

NOTICE TO BE SERVED WITH
WRIT OF HABEAS CORPUS AD
SUBJICIENDUM

IN THE SUPREME COURT OF HONG KONG
HIGH COURT
MISCELLANEOUS PROCEEDINGS

In the High Court of Justice

Whereas this Court has granted a writ of
habeas corpus directed to the Commissioner of
Prison commanding him to have the body of Ng
Yuen Shiu before the said court at the High
Courts of Justice, Battery Path, Hong Kong,
on the day and at the time specified in the
notice together with the day and cause of his

30

being taken and detained.

Hon. Rhind J.

10 Take notice that you are required by the said writ to have the body of the said Ng Yuen Shiu before this court on Thursday the 20th day of Nov. 1980, at 9.30 o'clock and to make a return to the said writ. In default thereof the said court will then, or so soon thereafter as counsel can be heard, be moved to commit you to prison for your contempt in not obeying the said writ.

Dated the 6th day of November, 1980.

To The Commissioner of Prison
The Attorney General

Sd: Kwan & Kwan

Solicitors for the Applicant

In the
Supreme Court

No.2

Notice to be served with Writ of Habeas Corpus Ad Subjiciendum

6th November 1980

(continued)

No. 3

RETURN OF COMMISSIONER OF
PRISONS FOR HONG KONG

20 IN THE SUPREME COURT OF HONG KONG
HIGH COURT

SCHEDULE

30 I, Thomas Gerard Garner, C.B.E., J.P., Commissioner of Prisons for Hong Kong in obedience to the writ herewith do certify and return that Ng Yuen Shiu is detained in my custody under and by virtue of a removal order made under Section 19(1)(b) of the Immigration Ordinance, Cap.115 and an order for detention pending removal under Section 32(3A) of the Immigration Ordinance. Both orders were signed by the Director of Immigration on the 31st day of October, 1980.

Dated the 13th day of November, 1980.

Sd: Thomas Gerard Garner

No.3

Return of Commissioner of Prisons for Hong Kong

13th November 1980

In the
Supreme Court

No.4
Judge's Notes

20th November
1980

No. 4

JUDGE'S NOTES

IN THE SUPREME COURT

Miscellaneous
Proceedings

1980 No. 1019

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING

Applicant

- and -

THE ATTORNEY GENERAL

Respondent

10

Coram: Roberts, C.J.
& Rhind, J.

JUDGE'S NOTES

Bernacchi, Q.C. & Sammy Lee (Kwan & Kwan) for
applicant

Barlow for respondent.

20th November, 1980.

p.47 NG YUEN SHIU Applicant affirmed in Puntì.
Examination by Barlow.

I swore these two affidavits on 18th
November and 19th November.

20

Affidavit of 18th November was read over
to me and I signed it.

I see para.3, in which I said Government
was appealing to all illegal immigrants to
register - and Government would consider each
case individually and sympathetically.

In the article, mainland China was mentioned.
I am referring to the article in Sing Pao. When
I read that paper it was about illegal immigrants
from Mainland China.

30

I was not directly affected, as I came from
Macao.

Para.5 of my affidavit says I saw T.V.B.
news when appeal made by Lam Yan-kwong, Assistant
Director of Immigration for all illegal

immigrants from Macao to come forward and register etc.

In the
Supreme Court

p.48 Mr. Lam appeared on screen on evening of 28th October. On that day residents from Macao went to appeal to Governor. Mr. Lam told them that during the time they went to register themselves they would not be arrested.

No.4
Judge's Notes
20th November
1980

(continued)

10 On 28th, after we had been to Queensway to get a piece of paper for registration, we went to Government House to petition Governor. We were interviewed by Immigration Officer and informed that during the time the investigation was being carried out we would not be arrested.

However, on 29th, when we sent to register ourselves, I was detained.

I am not sure how T.V. staff managed it.

I saw announcement on T.V. letting illegal immigrants from China to register.

This was read by an Immigration Officer.

20 On 28th October we went to register and got a piece of paper and then went to Government House to appeal to Governor.

Immigration Officer came out to see us and he told us that during investigation we would not be detained.

I saw the announcement on T.V. at 7 and again after 10.

30 I did not go to Government House. When I said "we" I was referring to underground residents here.

p.49 I look at para.5 of my affidavit. The T.V. programme was by an Immigration Officer acting as spokesman for Immigration Department outside Government House.

He orally promised us the case would be investigated and we would not be arrested. So I also read this news coverage in Sing Pao.

40 I learned of LAM Yan Kwong through friends of mine who were Macao residents, while I was in Victoria Remand Centre.

I saw Mr. Lam on the T.V. asking illegal immigrants from Macao to come forward and register.

I see record of Questions and Answers referred to in affidavit of LAM Yan Kwong.

(Interpreter translates them to Applicant).

In the
Supreme Court

No.4
Judge's Notes

20th November
1980

(continued)

This is what Mr. Lam said on T.V. news.

I had already been to Li Po Chun Building by then. I had an appointment following day at Victoria Barracks.

I was given piece of paper at Li Po Chun and told to go to Victoria Barracks next day. When I got there I was detained.

I look at para.7 of my affidavit.

Before I left Victoria Barracks I was told I was not free to go. I was first taken to finger-printing room and asked several questions. After that we were taken to cells at Victoria Remand Centre. 10

At Victoria Barracks, I told Immigration Officer that I was illegal immigrant from Macao who had returned.

p.50 I look at my second affidavit of 19th November. It is correct.

I signed a Notice of Appeal against my removal. (Ex. A to affidavit of KWAN Lim Ho (applicant's solicitor)) 20

That is only a copy. Original bears my signature. I read it before I signed it. It is correct.

I see para. 12, which says my business had 15 sewing machines - 15-20 workers - profits of \$15,000 to \$20,000 per month.

There is mistake. Profit should read \$15,000 to \$20,000 per year not per month.

This is first time I have noticed this mistake. 30

(Original Notice of Appeal shows that it was signed by applicant).

Bernacchi: No objection to original being handed in.

I look at para.10.

I agree I said I saved \$40,000 in 1976/77.

In my second affidavit I said I did not have to pay tax.

Partner and I have overheads. We added some more machines. 40

I did not say I was employee. The Immigration Officer made a mistake.

p.51 (The form shows employer as Kam Shing Garment Factory).

When I was in Victoria Barracks on 29th I asked Immigration Officer why I was detained. I was not given an answer. That was at Victoria Barracks.

In the
Supreme Court

No.4
Judge's Notes
20th November
1980

(continued)

On 29th, I read account in Sing Pao of events of evening before at Government House.

This is the report (P.1).

10 Bernacchi: Would like to ask Mr.Lam about para.5 of his affidavit.

LAM YAN KWONG

I look at my affidavit.

I gave these three answers to questions outside Government House.

A Mr. Fung, who said he was representing illegal immigrants from Macao, spoke to me.

20 The Questions and Answers were prepared before I went to Government House. These were handed to me by A.D.C. who asked me to deliver them to the Macao representatives.

I don't know who prepared them. I think A.D.C. told me Mr. Mason, P.A.S. Security had prepared them.

p.52 I gave Questions and Answers to Mr.Fung.

There was large group of people and reporters there. As far as I can recollect there was T.V. camera there.

I look at Sing Pao for next morning (29th).

30 I don't agree that I said that during investigation they would not be arrested or repatriated.

After I read out Questions and Answers, Fung asked me if anyone would get identity card. I said that they would have their cases judged on their merits. They would have to be investigated before anyone made their decisions.

40 Before evening of 28th October there was no announcement directed specifically at illegal immigrants from Macao.

The previous announcement about illegal immigrants from China was not made by me.

LYK1 is meant, in my view, to refer only to illegal immigrants directly from China.

As a result of announcement some illegal

In the
Supreme Court

No. 4
Judge's Notes

20th November
1980

(continued) p.53

immigrants who did not come directly from
China attended Victoria Barracks.

Not very dark outside Government House
on evening of October 28th.

There was bright light shining on me.
I don't know if it was T.V. light.

Meeting at Government House was 5.00 -
5.15 in evening.

Public announcement Ex.I was repeated
on T.V. in English and Chinese Channels by
Mr. C.K.Leung. 10

This was regularly repeated.

No other announcement was made relating
to illegal immigrants from elsewhere than
China.

Fung asked if there was amnesty. I
said there was not. No amnesty at all.

The subject of illegal immigrants from
places other than China who had previously
been removed was not mentioned. 20

No.5
Statements
filed pursuant
to Order 53
Rule 1(2) of
the Rules of
the Supreme
Court

24th November
1980

No. 5

STATEMENTS FILED PURSUANT
TO ORDER 53 RULE 1(2) OF
THE RULES OF THE SUPREME
COURT

No. 1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT
MISCELLANEOUS PROCEEDINGS

IN THE MATTER of an Application 30
by NG YUEN SHIU alias NG KAM
SHING for leave to apply for
an Order of Certiorari

- and -

IN THE MATTER of the removal
orders in 1976 and in 1980
against NG YUEN SHIU

- and -

IN THE MATTER of the decision
of the Immigration Tribunal

In the
Supreme Court
No.5
Statements
filed pursuant
to Order 53
Rule 1(2) of
the Rules of
the Supreme
Court

BETWEEN:

NG YUEN SHIU also
known as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

24th November
1980

(continued)

10

STATEMENT FILED PURSUANT TO ORDER
53 RULE 1(2) OF THE RULES OF THE
SUPREME COURT

1. The name and description of the Applicant is Ng Yuen Shiu, also known as Ng Kam Shing of 74, Oak Street, 8th floor, Taikoktau, Kowloon.

2. The relief sought is an Order for Certiorari to remove into this Honourable Court and quash the following Orders :-

20

(i) an Order made by the Director of Immigration on the 31st October 1980 that the Applicant be removed from Hong Kong to Macau and that the Applicant be detained in custody pending for the said removal,

(ii) a decision by the Immigration Tribunal on the 3rd November 1980 dismissing the Appeal without a hearing of the Applicant,

30

(iii) an Order made by the Governor on or before 19th February 1976 that the Applicant be removed from Hong Kong to Macau.

And that all necessary and consequential direction be given.

3. The grounds upon which the said reliefs are sought are as follows :-

Under 2(i) herein :-

(a) That the said Order was contrary to natural justice.

40

(b) That the said Order was made in consequence of an unreasonable exercise

In the
Supreme Court

No.5
Statements
filed pursuant
to Order 53
Rule 1(2) of
the Rules of
the Supreme
Court

24th November
1980

(continued)

of discretionary power of the
Director of Immigration and therefore
ultra vires.

Under 2(ii) and (iii) herein :-

- (c) That the said Order made in 1976 was wrong in law.
- (d) That at the date of the removal order in 1976 the Applicant had acquired a right to land and/or remain in Hong Kong.
- (e) That the said decision by the Immigration Tribunal is wrong in law in that since 1975, the Applicant has acquired a right to land and/or remain in Hong Kong.
- (f) That in the premises, there was an error of law on the face of the record.

10

Dated this 24th day of November 1980.

Sd: Kwan & Kwan

Kwan & Kwan
Solicitors for the Applicant

20

No. 1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT
MISCELLANEOUS PROCEEDINGS

IN THE MATTER of an Application
by NG YUEN SHIU alias NG KAM
SHING for leave to apply for
an Order of Prohibition

- and -

30

IN THE MATTER OF the removal
order in 1980 against NG YUEN
SHIU

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING

Applicant

- and -

ATTORNEY GENERAL

Respondent

STATEMENT FILED PURSUANT TO
ORDER 53 RULE 1(2) OF THE RULES
OF THE SUPREME COURT

In the
Supreme Court

No.5

Statements
filed pursuant
to Order 53
Rule 1(2) of
the Rules of
the Supreme
Court

24th November
1980

(continued)

1. The name and description of the Applicant is Ng Yuen Shiu, also known as Ng Kam Shing of 74, Oak Street, 8th floor, Taikoktaui, Kowloon.

10

2. The relief sought is an Order prohibiting the Director of Immigration from acting upon the removal order made on the 31st October 1980 that the Applicant be removed from Hong Kong to Macau.

3. The grounds upon which the said relief is sought are as follows :-

(a) That the said Order was contrary to natural justice.

20

(b) That the said Order was made in consequence of an unreasonable exercise of discretionary power of the Director of Immigration and therefore ultra vires, null and void.

(c) That the Applicant has acquired a right to land and/or remain in Hong Kong.

Dated the 24th day of November, 1980.

Sd: Kwan & Kwan

Kwan & Kwan
Solicitors for the Applicant.

In the
Supreme Court

No.6
Notice of
Motion

24th November
1980

No. 6

NOTICE OF MOTION

No. 1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

MISCELLANEOUS PROCEEDINGS

IN THE MATTER of an Application
by NG YUEN SHIU alias NG KAM
SHING for leave to apply for an
Order of Certiorari

10

- and -

IN THE MATTER of the removal
orders in 1976 and in 1980
against NG YUEN SHIU

- and -

IN THE MATTER of the decision
of the Immigration Tribunal

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING

Applicant

20

- and -

ATTORNEY GENERAL

Respondent

NOTICE OF MOTION

TAKE NOTICE that the Full Bench of the
Supreme Court of Hong Kong, High Court in
Victoria, Hong Kong will be moved on Monday,
the 24th November, 1980 by Counsel on behalf of
the Applicant, Ng Yuen Shiu also known as Ng
Kam Shing for leave to move for an Order that
the said Applicant be at liberty to apply for
leave to apply for an Order of Certiorari in
the matter and upon the Grounds set forth in
paragraph 2(iii) of the copy statement filed
pursuant to Order 53, Rule 1(2) of the Rules of
the Supreme Court, served herewith, notwith-
standing that the time for so doing has expired.

30

AND FURTHER TAKE NOTICE that the Grounds of
this application are :-

- (1) The seeking of this Order is a formality for the purpose of determining whether the Applicant has a right to land and/or remain in Hong Kong at the present time.
- (2) The granting of the relief sought would not cause any hardship to or substantially prejudice the rights of any person or detrimental to good administration.

In the
Supreme Court

No.6
Notice of
Motion

24th November
1980

(continued)

10

Dated this 24th day of November, 1980.

Sd: Kwan & Kwan

Kwan & Kwan
Solicitors for the Applicant

No. 7

ORIGINATING NOTICE
OF MOTION

No. 1019 of 1980

No.7
Originating
Notice of
Motion

24th November
1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT
MISCELLANEOUS PROCEEDINGS

20

IN THE MATTER of an Application
by NG YUEN SHIU alias NG KAM
SHING for leave to apply for
an Order of Certiorari and
Prohibition

- and -

IN THE MATTER of the removal
Orders in 1976 and in 1980
against NG YUEN SHIU

30

- and -

IN THE MATTER of the decision
of the Immigration Tribunal

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING

Applicant

In the
Supreme Court

No.7
Originating
Notice of
Motion

24th November
1980

(continued)

- and -

THE ATTORNEY GENERAL

Respondent

ORIGINATING NOTICE OF MOTION

TAKE NOTICE that pursuant to the leave of the Full Bench of the Supreme Court of Hong Kong, High Court, Victoria, Hong Kong given on the 24th day of November 1980, the Full Bench of the High Court will be moved on 24th day of November, 1980 or so soon thereafter as Counsel can be heard, by Counsel on behalf of the Applicant of 74, Oak Street, 8th Floor, Taikoktau, Kowloon for an Order of Certiorari to remove into the High Court for the purpose of its being quashed the following Orders :- 10

1. an Order made by the Director of Immigration on the 31st October 1980 that the Applicant be removed from Hong Kong to Macau and that the Applicant be detained in custody pending for the said removal. 20
2. a decision by the Immigration Tribunal on the 3rd November 1980 dismissing the Appeal without a hearing of the Applicant.
3. an Order made by the Governor on or before 19th February 1976 that the Applicant be removed from Hong Kong to Macau.

on the Grounds set out in the copy statement served herewith used on the application for leave to apply for such Orders. 30

AND

for an Order of Prohibition prohibiting the Director of Immigration from acting upon the removal order made on the 31st October 1980 on the grounds set out in the copy statement served herewith used on the application for leave to apply for such order AND that the costs of and occasioned by this Motion be provided for. 40

AND TAKE NOTICE that upon the hearing of this Motion, the Applicant will use the following affirmations and the exhibits therein referred to, namely, the Affirmation of the Applicant

affirmed on 18th November 1980 and 19th November 1980, and the Affirmation of Kwan Lim Ho affirmed on 5th November 1980 in Miscellaneous Proceedings No. 1019 of 1980.

Dated this 24th day of November 1980.

TO: Attorney General

Sd: Kwan & Kwan
Kwan & Kwan
Solicitors for the Applicant

In the
Supreme Court

No.7
Originating
Notice of
Motion

24th November
1980

(continued)

10

No. 8

JUDGMENT OF THE
HONOURABLE CHIEF
JUSTICE

No.8
Judgment of
the Honourable
Chief Justice

4th December
1980

IN THE HIGH COURT

Miscellaneous Proceedings
1980 No. 1019

IN THE MATTER OF Ng Yuen Shiu
also known as Ng Kam-Shing

- and -

20

IN THE MATTER OF an Application
for a Writ of Habeas Corpus ad
Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

Coram: Roberts, C.J. and Rhind, J. (Full Bench)
Date: 4th December, 1980.

30

J U D G M E N T

√Duty of administrative authority to
act fairly√

In the
Supreme Court

No.8
Judgment of
the Honourable
Chief Justice
4th December
1980
(continued)

Roberts C.J.:

Preliminary

The applicant NG Yuen-Shiu sought a writ of habeas corpus, by notice of motion dated 6th November, 1980.

At the hearing of the application on that date Rhind J. ordered that a writ of habeas corpus be directed to the Commissioner of Prisons for the production of the applicant before the High Court on 20th November.

10

During the hearing before a Full Bench of the High Court, which took place on 20th, 24th and 25th November, the applicant obtained leave, with the consent of the Crown, to file an application for judicial review under Order 53, by way of an originating motion.

The application sought an order of certiorari to quash -

- (a) the Order of Removal of 31st October, 1980 made against the applicant by the Director of Immigration ("the Director");
- (b) the decision of the Immigration Tribunal on 3rd November, 1980;
- (c) an Order of Removal made by the Governor of 19th February, 1976.

20

The application also sought an order of prohibition to restrain the Director from executing the Removal Order of 31st October, 1980.

Counsel for the applicant conceded that he would not be able to argue the grounds set out in that application, in the face of the decision by the Court of Appeal from Hong Kong in Attorney General v. Cheung Kam-Ping (1), unless we were prepared not to follow it.

30

He argued that a Full Bench of the High Court is of co-ordinate jurisdiction with the Court of Appeal and that we were not therefore obliged to follow its rulings. We did not agree. A Full Bench is part of the High Court, the decisions of which are subject to appeal to the Court of Appeal. It is self-evident, in accordance with the doctrine of precedent, that

40

(1) Civil Appeal 1980 No.58

the decisions of an appellate court must be followed by any court whose decisions are subject to that appellate court's review. So we announced that we considered that we were bound to follow Cheung Kam-ping.

In the
Supreme Court

No.8
Judgment of
the Honourable
Chief Justice

4th December
1980

(continued)

10

Counsel for the applicant therefore did not pursue further any argument that the Director or the Tribunal had been wrong in finding that the applicant had no right to reside in Hong Kong. The dismissal of his application for orders of certiorari and prohibition would enable him, if the matter were taken further, to attempt to persuade the Court of Appeal that its earlier decision in that case was per incuriam.

Background Facts.

20

The applicant was born in China on 16th May, 1951 and taken to Macao by his parents at the age of three. He entered Hong Kong illegally in 1967, completed an apprenticeship in the repair of sewing machines and started to work in garment factories in 1968.

In 1976, he applied for an Identity Card, as a result of which he was removed to Macao in March of that year in accordance with an Order for Removal signed by the Governor. He re-entered Hong Kong illegally a month later and has remained here since.

30

The applicant asserts that he has been running his own business, with Mr. Kwong Chi-pang listed as the registered proprietor. The business, which is called Kam Shing Garment Factory, has 15 sewing machines and employs several workers.

40

On 23rd October this year, the Hong Kong Legislature enacted the Immigration (Amendment) (No.2) Ordinance 1980. The effect of this was to make it obligatory for all residents of Hong Kong to carry proof of identity and to prohibit the employment of illegal immigrants.

This Ordinance also conferred upon the Director of Immigration the power to make removal orders under section 19 of the Ordinance.

Linked to the enactment of this Ordinance, the Government announced on 23rd October, that the previous "reached base" policy would be discontinued forthwith. Under this policy, an illegal immigrant entering the territory from

In the
Supreme Court

No.8
Judgment of
the Honourable
Chief Justice

4th December
1980

(continued)

China would not be repatriated if he managed to reach any of the urban areas without arrest.

This "reached base" policy had never applied to illegal immigrants entering the territory from anywhere other than China.

Between 24th and 26th October, a series of television announcements was made, in English and Cantonese, explaining that all illegal immigrants from China who did not possess a Hong Kong Identity Card or had not registered for one would be liable to be repatriated unless they registered for a Hong Kong Identity Card by midnight on 26th October. 10

This announcement made no reference to illegal immigrants arriving from places other than China. This appears to have left some doubt in the minds of those who were born in China but had come to Hong Kong only after a period in some other place en route.

In particular, there was a number of illegal immigrants who were born in China, had moved to Macao and entered Hong Kong illegally from there. The applicant was one of these. 20

On the evening of the 28th October, a group submitted a petition to the Governor, at Government House, seeking assurances about illegal immigrants who had entered from Macao.

According to Mr. Lam Yan-kwong, an Assistant Principal Immigration Officer, whom we permitted to be called to give evidence in amplification of his affidavit, he read to the group, outside Government House that evening, a set of questions and answers, which had been prepared for him by a senior officer in the office of the Secretary for Security, who is the head of the policy branch of the Government Secretariat responsible for immigration. In a general sense, the Secretary for Security can be regarded as the superior of the Director of Immigration. 30

The Questions and Answers were as follows - 40

"Q. Should we report to Victoria Barracks?

A. No. You should go to Li Po Chun Chambers individually from 9 o'clock tomorrow morning as have over 2,500 people today.

Q. Will we be arrested?

A. No. Not during these interviews.

Q. Will we be given identity cards?

A. Those IIs from Macau will be treated in accordance with procedures for IIs from anywhere other than China. They will be interviewed in due course. No guarantee can be given that you may not subsequently be removed. Each case will be treated on its merits."

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There was some argument as to whether or not Mr. Lam himself appeared on the Television News that evening. He says that he did not appear on a separate programme, but that a T.V. camera was present when he read out the Questions and Answers and he may have been filmed. Alternatively, T.V. programmes may have consisted only of T.V. reporters relating what Mr. Lam was supposed to have said.

20

We do not think that it matters. What is important is what Mr. Lam said, not what he may have been reported to have said. We accept that what he did say was what is set out above, supplemented by his answers to additional questions put to him by one of the group. In these he replied, when he was asked if anyone would get identity cards, that they would have to have their cases judged on their merits and that they would be investigated before decisions were reached. He also stressed that there had been "no amnesty".

30

The same considerations apply to a newspaper report which was produced by the applicant. This appeared on the morning of 29th October and contains a version of what Mr. Lam was supposed to have said. The report did not conform in some respects with what we find Mr. Lam said.

40

The Government cannot be made in any sense responsible for inaccurate reports of Mr. Lam's words, whatever effect these may have had on the minds of the applicant and other illegal immigrants. We therefore have to consider only the effect of the words which Mr. Lam himself uttered.

Arrest and Detention

50

The applicant (whom we also permitted to give oral evidence in amplification of his affidavit) asserted that, after reading in a newspaper an appeal by the Government to all illegal immigrants to register, he went to the Immigration Department at Li Po Chun Chambers on the morning of 28th October. He was there given a map and card, telling him to attend at the Victoria Barracks Immigration Clearance

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Office ("Victoria Barracks") the following morning. It was on that evening that he saw the T.V. programme dealing with Mr. Lam's statement outside Government House.

On the morning of 29th October, he went to the Victoria Barracks, taking with him various documents, among them the Removal Order which had been made against him in 1976.

He was there interviewed by an Immigration Officer, who asked him a few questions, took his papers and told him to wait in another room. Early in the afternoon, he was taken by van, with others, to the Victoria Immigration Centre, ("V.I.C.") which was inside the Victoria Prison. He said that it was only then that he realized he had been arrested.

10

He was, at that stage, according to the evidence of Mr. Cheuk, detained for further investigation under section 26(a) of the Immigration Ordinance.

20

Later the same day, he was interviewed in the V.I.C. by Mr. Kwong Kam-yuen, an Immigration Officer, who asked him various questions. His answers were recorded by Mr. Kwong on Form 10600 headed "Immigration Interview Report VIC" (the "Interview Report"). The applicant asserts that he asked Mr. Kwong why he was arrested and what steps would be taken against him but that he received no reply. He added -

"I was not informed of the purpose of this interview nor did he allow me to say anything other than answering his specific questions."

30

The Interview Report was passed to Mr.K.H. Lau, a Senior Immigration Officer at the V.I.C. Mr. Lau passed it to Mr. Cheuk Koon-chau, acting Chief Immigration Officer.

Before the papers reached Mr. Cheuk, enquiries had been made of the applicant's supposed employers to check the accuracy of his version of what work he had been doing, and the department's records had been checked.

40

Mr. Cheuk submitted an application for a Removal Order to the Director on 31st October. This application summarized the material contained in the Interview Report and gained from the enquiries which had been made. He

recommended the removal of Mr. Ng Yuen-shiu to China.

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10 The application addressed to the Director was said to be accompanied by the case file. This presumably contained the Interview Report. The Director personally considered the application and ordered the applicant's removal to China under section 19(1)(b) of the Immigration Ordinance and his detention pending such removal under section 32(3A).

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On 31st October, the applicant was issued with a Notice of Removal Order, signed by Mr. Cheuk, informing him that the Director had made a Removal Order against him. The notice further told him that he had a right to appeal to a Tribunal under section 53A of the Immigration Ordinance against the decision to make the Removal Order.

20 The applicant availed himself of this right by entering Notice of Appeal on the same date, with the assistance of a firm of solicitors. In this Notice he set out details of his personal history before and after his first entry into Hong Kong in 1967.

30 On 3rd November he was notified of the Tribunal's decision to dismiss his appeal without a hearing, as it has power to do by section 53C of the Immigration Ordinance if satisfied that the matters on which an appellant seeks to rely are matters which would not entitle him to succeed in the appeal.

It is to be noted that the jurisdiction of this Tribunal, which is expressed by section 53D(2) to be final, is limited to deciding only if the appellant has the right to land in Hong Kong under section 8 of the Ordinance and whether he had the permission of the Director to remain, when the Removal Order was made.

40 In view of the fact that a Removal Order was made against the applicant in 1976 and that he had admitted in the Interview Report that he was an illegal immigrant when he returned later that year, the Tribunal could hardly have reached any other conclusion.

Estoppel

The first main argument for the appellant was that the Crown is estopped, by the statement

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made by Mr. Lam, from arresting the applicant
or from making a Removal Order against him.

There was a clear assurance by Mr. Lam,
made with the full authority, and indeed on the
express direction, of the office of the Secretary
for Security, that those who attended the Li Po
Chun Chambers would not be arrested during those
interviews. Mr. Lam made it clear that he was
talking about illegal immigrants from Macao,
as is also apparent from the terms of the
Questions and Answers. 10

We are satisfied that this undertaking was
substantially broken by the Crown the following
day when the applicant was arrested in Victoria
Barracks, at the end of his short interview
there.

Mr. Cheuk's affidavit shows that illegal
immigrants, other than those who had entered
directly from China before 24th October, 1980,
were sent to the V.I.C. for detention under
section 26(a) of the Immigration Ordinance. We
find that the arrest took place in the office
in Victoria Barracks. 20

The applicant had, of course, presented
himself at Li Po Chun Chambers before Mr. Lam's
public assurance about arrest. Nevertheless,
he asserted that he relied upon that assurance
when he presented himself at Victoria Barracks
on 29th October and we accept that he did.

What is the effect of an undertaking given 30
by a public officer, in the scope both of his
ostensible and actual authority, as to the
exercise by the Crown of a statutory power? There
was a broken promise, but has it any legal
effect?

The consequences in law of erroneous
assurances or advice given by officials upon
which members of the public rely to their detri-
ment are not clear. Earlier authorities seem
to have established that they were of no effect,
unless a misrepresentation could be shown to
have caused monetary loss. 40

More recent cases, however, suggest that
where a public officer gives an assurance,
which disregards formal or procedural statutory
requirements and on which individuals have
relied to their detriment, the public authority
concerned is bound by the assurance, see Re
L. (A.C.) (an infant)(2)

(2) (1971) 3 All E.R. 743

10 Counsel for the applicant relied in this connection on R. v. Liverpool Corporation ex parte Liverpool Taxi-fleet Operations' Association (3), in which a local authority was prevented from implementing a decision to change its licensing policy until it had honoured an undertaking given to those who would be affected that they would be given an opportunity to make representations before the policy was changed.

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The general principle, according to de Smith on Judicial Review of Administrative Action (4th Ed. p.104), "remains that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Exceptions that are inspired by a desire to ensure that public bodies act 'fairly' should be made with circumspection."

20 The assurance given by Mr. Lam did not relate to any decision which would be taken by the Director. Had he asserted (as was erroneously reported in the newspaper article which was tendered in evidence) that nobody who reported for interviewing would be repatriated, a more difficult question would have arisen. But he did not. His assurance was limited only to the exercise of the power of immigration officers to arrest illegal immigrants from Macao, when they attended for interview.

30 The applicant is entitled to feel a sense of grievance at the way in which he was misled. But we know of no authority which entitles us to find that the arrest itself was illegal, because the applicant put himself in peril of it by virtue of an undertaking which was broken.

40 Similarly, even if the initial arrest for investigation had been unjustifiable in law, this could not have vitiated the Removal Order which the Director subsequently made (assuming that the procedures in relation thereto were correctly observed). Consequently, the order of detention made by the Director, under section 32(3A) of Cap.115 could not have been affected and it is this warrant which is the present authority for the detention of the applicant.

Duty of Director to act fairly

The principal argument advanced by the

(3) (1972) 2 Q.B. 299.

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applicant was that the Director was obliged to act in accordance with the principles of 'natural justice' and that he failed to do so, because -

- (a) he did not honour the undertaking given by Mr. Lam that each case would be considered on its merits and would be investigated before a decision was reached;
- (b) the applicant was not afforded an opportunity of advancing such arguments as he wished, as to why the Director should not exercise the discretion which he enjoys under section 19 of the Immigration Ordinance not to make a Removal Order against the applicant. 10

It is convenient first to consider whether there is any obligation in law upon the Director to act in accordance with the principles of natural justice. Many of the earlier authorities on this subject made a distinction between decisions of a judicial or quasi-judicial nature and those which were not. It was said that the rules of natural justice might apply to the former (whether they did so in fact needed to be determined by looking at the function concerned in each separate case) but did not apply to the latter. Ridge v. Baldwin (4) removed this distinction. Thus any decisions before that case must be approached with Ridge v. Baldwin (4) in mind. 20 30

The phrase "duty to act fairly" has been used increasingly in the judicial vocabulary in recent years, where the phrase "a duty to observe the rules of natural justice" might formerly have been employed. The latter term, which imports an obligation to act judicially, was appropriate when, before Ridge v. Baldwin (4) the rules of natural justice were applicable only to judicial or quasi-judicial functions. Now that the duty to apply those rules is not so confined, it seems preferable to refer to a "duty to act fairly". 40

The latter term should enable the courts to deal more freely and flexibly, with procedural and substantive aspects of the exercise of statutory power by public authorities, than they

(4) (1964) A.C. 40

might have done when they were obliged to confine their interventions within the narrower phrase of "natural justice". The duty to act fairly will include the circumstances where natural justice has been applied, but will not be limited thereby.

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10 The duty to observe the rules of natural justice is now to be inferred not from the nature of the process but from the nature of the power. In Durayappah v. Fernando (5), it was suggested that three matters should be considered when deciding whether the nature of the power requires such an inference; first, the nature of the complainant's interest; second the conditions under which the administrative authority is entitled to encroach on those interests; third, the severity of the sanction. These seem to be useful guides, though their application to individual situations is often
20 difficult.

It is in relation to the first of these tests that the applicant faces considerable difficulty, since the authorities support the contention that the courts will not grant the protection of the rules of natural justice to some classes of persons - and in particular to aliens - see R. v. Brixton Prison Governor, ex parte Soblen (6) and Schmidt v. Sec. of State, Home Affairs (C.A.) (7) By a majority (albeit, if we may say so, a somewhat unusual majority since the Chief Justice, in the event of equal votes, counts as two), the High Court of Australia came to the same conclusion in Salemi v. Minister for Immigration and Ethnic Affairs (No.2) (8).

40 In Schmidt (7), Lord Denning observed, in relation to students who had been refused an extension of stay in the United Kingdom, that he saw no basis for the suggestion that they should be given a hearing before refusal. Aliens, he said, had no right to be in the U.K. except by licence of the Crown. At page 17, he added, after referring to an unreported case in which the Divisional Court had held that a Commonwealth citizen could be refused entry without reason being given and without an opportunity to be heard -

50 "If such be the law for a commonwealth immigrant, it is all the more so for a foreign alien. He has no right to enter

- (5) (1967) 2 A.C.337, at p.339 (P.C.)
(6) (1963) 2 Q.B. 243
(7) (1969) 2 Ch. 149
(8) (1977) 14 A.L.R.1

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this country except by leave: and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked before the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right and, I would add, no legitimate expectation - of being allowed to stay. He can be refused without reasons given and without a hearing."

10

It is worth noting that Schmidt (7) came before the Court of Appeal as an appeal against an order that the plaintiff's claim be struck out as an abuse of the process of the court. That appeal was dismissed because it seemed to the majority of the court that the law with regard to the rights of aliens seeking entry was so clear that an action which sought a declaration that such applications by aliens must be dealt with in accordance with the rules of natural justice was unarguable.

20

We were referred to two other cases dealing with immigration, which, it was argued, led to a different conclusion. In Re H.K. (An Infant) (9) a Commonwealth citizen had a right of admission to the U.K. if he was, as he claimed to be, under the age of 16. Lord Parker held that the immigrant should have been afforded an opportunity to satisfy the immigration officer that he was under that age.

30

In A.G. v. Ryan (10) the respondent had been ordinarily resident in the Bahamas since 1947. He applied for Bahamian citizenship in 1974, under an Article of the Constitution which entitled him to so apply. He was given an interview, at which he was questioned about his activities since 1947, but was not informed of any reason which might be a ground for refusal. His application was later refused without reason being given. The Privy Council held that the Minister was obliged to observe the principles of natural justice since he was determining a question affecting the legal rights of individuals.

40

(7) (1969) 2 Ch.149
(9) (1967) 2 Q.B.617
(10)(1980) 2 W.L.R. 143

Both cases seem to us to be readily distinguishable from the approach adopted by Schmidt (7) since they deal with persons who had a right, if they satisfied specified statutory conditions, to be accorded permission to stay or registration as a citizen.

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10 The case of an alien seeking entry would be analagous to In Re H.K. (An Infant) and Ryan if the alien were seeking to establish that, by virtue of section 8(1) of Cap.115, he has a right to land in Hong Kong. Where this claim is put forward, the rules of natural justice would certainly apply.

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20 To ensure that these rules are followed, the Ordinance has established a Tribunal to determine that question. The Notice of Removal Order which is served on an immigrant when the Director has made such an Order against him draws attention to the right of appeal to that Tribunal.

30 The position is very different where an alien is seeking entry, or has already entered and remained illegally and is asking that his stay be legitimized. Nor, if Lord Denning's phrase about "legitimate expectation" is adopted, does it seem to us that he has such an expectation. If an alien, who seeks permission to land openly and properly and is refused, has no right to a hearing, how can it be said that an alien who enters by stealth and later emerges should be in a better position.

40 It may be that his activities since his arrival have been beneficial to the territory. They may have shown him to be a desirable citizen who can contribute substantially to the community. These are factors to which the Director may or may not give weight; whether he does or not is a matter for him. But the fact that an alien is a desirable person cannot enlarge his legal rights so as to entitle him to insist that the rules of natural justice be applied to him.

Lord Denning himself, in Selvarajan v. Race Relations Board (11) sets out the following broad principles -

"In all these cases it has been held that the investigating body is under a duty to

(7) (1969) 2 Ch.149

(11) 1976 1 All E.R.12, at p.19

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act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or or he exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given."

10

This passage, taken by itself, could be said to oblige the Director to "act fairly" in dealing with Removal Orders, since an alien seeking permission to enter may certainly be adversely affected by the decision. However, though this may be accepted as a proper statement of the general principle, the exception as to aliens remains at common law as the Full Bench decided in Wong Bat Kien (12).

20

Had it been open to us to do so, we might well have been inclined to prefer the dissenting judgment of Murphy J. in the Salemi Case (8). As he put it succinctly at page 48 -

30

"I do not read s.18 as enabling a Minister to exercise his discretion (to order deportation) in bad faith, without regard to the interests of the person affected and in a manner which denies natural justice."

Did the Director act fairly?

It is not necessary for us to decide this question, since we have concluded that no duty lies upon him to do so. Nevertheless, in case the matter is taken further, we thought it desirable to indicate what we would have found had we been obliged to reach a decision on the matter.

40

(8) 1977 14 A.L.R. 1

(12) M.P.No.440/1973 (Unreported)

The first complaint was that the Director did not honour the undertaking given by Mr.Lam that each case would be considered on its merits and would be investigated before a decision was reached.

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10 We see no substance in this. The applicant was arrested at Victoria Barracks at 11.00 a.m. on 29th October, according to the Interview Report. He arrived at the V.I.C. at 11.35. His interview with Mr. Kwong ended at 2.35, though we were not told how long it took.

The Interview Report, the accuracy of which has not been challenged by the applicant save with regard to his employment status, shows that he was asked a series of questions about his background and family history. It recites the previous Removal Order made against him and his illegal return to the territory in 1976.

20 The Interview Report shows that Mr.Kwong directed his attention to the various questions set out in part D of the form. He ticked the boxes which indicated that the applicant came from Macao and was not eligible to stay. He did not tick those boxes which suggested that the applicant might have been eligible to stay by reason of Hong Kong Belonger or Chinese Resident status or that there might be humanitarian reasons in favour of his stay.

30 It is apparent from a note in Mr. Kwong's hand in the Interview Report, and from the application for a Removal Order signed by Mr. Cheuk, that a telephone call was made to the person thought to be the applicant's employer and that the latter indicated that the applicant had been working with him for two years.

40 The application for Removal Order also states that there were "no strong humanitarian grounds or other special aspects of the case which I consider would justify the subject remaining in Hong Kong". It is to be presumed that Mr. Cheuk did consider these matters before he signed the application. The minute on the applicant's file, put before the Director, contains a similar opinion, namely

"that there are no strong humanitarian or other circumstances which would warrant any (of the three persons dealt with in the minute) being allowed to stay."

All these factors satisfy us that each

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individual case was considered on its merits and was investigated by officers of the department before a decision was reached by the Director, before whom the information gleaned by those officers was placed.

A subsidiary argument mounted by counsel for the applicant was that the Director had not exercised a true discretion under section 19 of Cap.115, since he had made up his mind that any illegal immigrant against whom a previous Removal Order had been made would be removed, whatever the merits of his individual case.

10

We have no evidence as to this. All we know, from the affidavit of Mr. Cheuk, is that illegal immigrants, from places other than China, were to be arrested and sent to V.I.C. for investigation. We do not know the grounds on which the Director ordered the removal of the applicant. He does not say whether or not the fact that a previous Removal Order has been made was the reason for making this Removal Order.

20

It was then argued that the applicant had not been treated fairly because he had not been told, when he was interviewed, why he had been arrested; nor was he allowed to say anything other than to answer the specific questions of the interviewing officer.

Since there is no evidence from Mr. Kwong as to what took place at the interview, we must accept the version given by the applicant. He may have felt that he had been unfairly treated by being arrested in Victoria Barracks and taken to the V.I.C., but can he have been under any illusion as to what this interview was for?

30

The public statement made by Mr. Lam, on which the applicant said he had relied so heavily, made it clear that illegal immigrants from Macao would be interviewed and that no guarantee could be given that they might not subsequently be removed. Further, the nature of the questions which were asked must surely have alerted him to the fact that the object of the interview was to enable a decision as to his removal to be reached, whether or not the Immigration Officer said this to him in so many words.

40

The final argument was that the applicant

50

10 was not given an opportunity to "put his case" for the exercise of the Director's discretion in his favour, that is to say, to advance his arguments for being allowed to stay on humanitarian grounds. He cannot, of course, assert that, because of his good behaviour in Hong Kong and of the worthwhile contribution which he says he has made to the community, the Director would necessarily have come to a different conclusion. He complains that the Director was deprived of the opportunity of doing so.

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In particular, he asserts that, by the manner in which his interview with Mr. Kwong was conducted, he was not able to explain that he was not an employee, but a partner in a business which employed several workers.

20 The only evidence of what happened at the applicant's interview with Mr. Kwong is the description given by the applicant in his affidavit, i.e. that he was not allowed to say anything other than in answer to the questions put to him by Mr. Kwong. The latter, in his affidavit, says nothing of what transpired at the interview. We must therefore accept the applicant's version, since the Crown has not sought to contradict it, for the purposes of this proceedings.

30 The interviewing officer knew (as did, we have found, the applicant) that the questions which he was asking were intended to elicit information upon which the removal of the applicant was to be considered. He knew that one of the factors to be taken into account was the possibility of "humanitarian reasons".

40 This phrase is not defined but in the ordinary sense of the term may be taken to include such matters as family ties, the distress which removal might cause to others dependent on the subject, the physical and mental health of the subject and, perhaps, as the applicant asserts, his contribution to Hong Kong.

50 The Senior Immigration Officer, when completing Part E of the Interview Report states that he is satisfied that "there are no strong humanitarian or other special factors which need to be considered". This is a further indication that the Director is expected to take them into account when determining whether or not to issue a Removal Order.

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Are such grounds to be merely derived from such material as emerges from the questions, or should the subject be given the chance to state them? We think he should. It is likely that an illegal immigrant, being interviewed by an immigration officer and knowing that his future is at stake, will be nervous and perhaps overawed. It would be easy for him to do no more than respond to questions and to fail to put forward any special factors, unless he is asked if there are any. In the great majority of cases there will be none. But we think that he should have been asked whether there were any humanitarian reasons or other special factors which he would like to be taken into account before a decision was reached. If this had been done, he would not have been able to claim that he had no opportunity of making it clear that he was a proprietor of a business and not just a technician. 10

To ask such a question would not throw an unreasonable extra burden on immigration officers, and would remove any doubt as to whether or not they have acted fairly in dealing with illegal immigrants where removal is being considered. 20

Thus, had we been able to find (as we were not) that the law requires the Director, in exercising his powers under section 19 of Cap.115, to "act fairly", we should have further found that there was such a failure, to the limited extent described above; in all other respects, the procedures followed by immigration officers after the applicant's arrest seem to us to have been impeccable. 30

In view of the conclusion which we have reached, that there was, in one respect, a failure to "act fairly", it may be that the Director will feel disposed to reconsider this case before effect is given to the Removal Order issued against the applicant.

In the result, therefore, we must refuse the relief sought and the writ of habeas corpus is quashed. 40

The orders of certiorari and prohibition are also refused.

B. Bernacchi, Q.C. & Sammy Leo (Kwan & Kwan)
for applicant
Barlow for respondent

No.9

In the
Supreme Court

ORDER

No.9
Order

No. 1019 of 1980

4th December
1980

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

MISCELLANEOUS PROCEEDINGS

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

10

IN THE MATTER of an Application
for a Writ of Habeas Corpus ad
Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING

Applicant

- and -

ATTORNEY GENERAL

Respondent

20

BEFORE THE HONOURABLE SIR DENYS ROBERTS CHIEF
JUSTICE AND THE HONOURABLE MR. JUSTICE RHIND
IN COURT

O R D E R

Dated the 4th day of December, 1980

The Applicant, Ng Yuen Shiu, being brought
here into Court in custody of the Commissioner
of Prisons by virtue of a Writ of Habeas Corpus

30

IT IS ORDERED that the said Writ and the
Return made thereon be filed AND UPON READING
the said Return AND UPON HEARING Counsel for
the Applicant Ng Yuen Shiu also known as NG KAM
SHING and Counsel for the Respondent

IT IS ORDERED that the Writ of Habeas
Corpus be quashed

AND IT IS ORDERED that the Application for
Orders of Prohibition and Certiorari be dismissed

AND IT IS ORDERED that the Order of Removal

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be stayed on condition that the Appeal be entered within 7 days and will be prosecuted with diligence

AND IT IS ORDERED that the Applicant be admitted to bail pending the determination of the Appeal in the sum of \$10,000.00, to be deposited with the Registrar of Supreme Court, and with one surety in like amount, to the satisfaction of the Registrar of Supreme Court

10

AND IT IS ORDERED that the recognizance may be executed before a Superintendent of Prisons.

Sd: N.J.Barnett

N.J.Barnett
Acting Registrar

No. 10

In the Court
of Appeal

NOTICE OF APPEAL

No.10
Notice of
Appeal

Legal Aid No. M/LA 1772/80 (NMGS)

10th December
1980

IN THE COURT OF APPEAL

(ON APPEAL FROM THE HIGH COURT FULL
BENCH, Miscellaneous Proceedings
No.1019 of 1980)

IN THE MATTER OF Ng Yuen Shiu
also known as Ng Kam-Shing

- and -

IN THE MATTER OF an Application
for a Writ of Habeas Corpus ad
Subjiciendum

- and -

IN THE MATTER OF an Application
for an order of Certiorari and
an order of prohibition

BETWEEN:

NG YUEN SHIU also known
as NG KAM-SHING

Appellant

- and -

ATTORNEY GENERAL

Respondent

NOTICE OF APPEAL

TAKE NOTICE that the Court of Appeal will
be moved so soon as Counsel can be heard on
behalf of the abovenamed Appellant on appeal
from the order of the Full Bench of the High
Court of Justice dated the 4th day of December,
1980 whereby the said court :

1. quashed the writ of habeas corpus made
on the 6th November, 1980 directed to
the Commissioner of Prisons for the
production of the Appellant before the
High Court on 20th November, 1980.
2. refused the Appellant's application
for an order of Certiorari to quash
 - (i) the Order of Removal of 31st
October, 1980 made against the
Appellant by the Director of
Immigration;

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(continued)

(ii) the decision of the Immigration
Tribunal on 3rd November, 1980;
and

(iii) an Order of Removal made by the
Governor of 19th February, 1976.

3. refused the Appellant's application
for an Order of Prohibition to restrain
the Director of Immigration from
executing the Removal Order of 31st
October, 1980.

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may be set aside, and that the said orders of
certiorari and prohibition and the said writ of
habeas corpus may be issued to the Appellant
against the Respondent.

AND FURTHER TAKE NOTICE that the grounds
of this Appeal are that :

1. That the Immigration Tribunal erred in
law in finding that the Appellant has
not acquired a right to land/or remain
in Hong Kong at the time the Removal
Order was made on the 31st October,
1980.
2. That the Orders of Removal on the 31st
October, 1980 and on the 19th February
1976 was wrong in law in that since
(or before) 1975, the Appellant has
the right to land and/or remain in
Hong Kong by virtue of Section 8(1) of
the Immigration Ordinance, Chapter 115.
Alternatively, that the power to issue
a removal order only arises (in the
circumstances here) where the Appellant
could have been prosecuted for an
offence under Section 36(1) of Chapter
115 or in the final alternative, the
Appellant had by February 1976 acquired
something in the nature of a vested
right to remain.
3. That insofar as the decision in R. v.
Cheung Kam Ping, Civil Appeal No.58
of 1980, affects the Appellant, the
same is not binding on another Court
of Appeal or Court of co-ordinate
jurisdiction because the Appellant's
personal liberty is involved. Alter-
natively, the said decision was wrong
in law and therefore bad per incuriam.
4. That the Full Bench erred in law in

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holding that Director of Immigration has no duty to act fairly when the order of removal was made on the 31st October, 1980 against the Appellant. The Full Bench erred in particular in holding that :

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(i) there is a particular class of people, namely, aliens, that are excluded from the procedural protection of any natural justice.

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(ii) the Director of Immigration did not have a duty to act fairly when exercising his discretion under section 19 of Chapter 115 when the following findings of or not disputed facts should have given rise to a case where the Director is compelled to consider his case fairly, namely :-

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(a) the Appellant registered himself at the Immigration office for interview in reliance on an express assurance from the Government to all Macau illegal immigrants that each case would be treated on its merits and investigated before a decision would be reached;

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(b) the assurance was given immediately after an amnesty to all illegal immigrants directly from China which created an expectation to the Appellant who was born in China and would have fallen within the ambit of the amnesty but for the fact that although born in China, he actually came from Macau; and

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(c) the Appellant has been in Hong Kong since 1967 and the removal order would deprive him of all the investment and establishment that he had made in Hong Kong including his partnership in Kam Shing Garment Factory.

5. The Full Bench erred in their findings

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that the Director of Immigration had honoured his undertaking that each case would be considered on its merits and would be investigated before a decision was reached in that :-

- (i) it cannot be said to have considered the merits of the Appellant when the findings of fact are :-
 - (a) the Appellant had not been given any opportunity to "put his case"; 10
and
 - (b) he was not allowed to say anything other than answering specific questions put by the Immigration Officer.
- (ii) the Appellant was given no opportunity to prepare his case and to present relevant materials to the Director of Immigration to consider when he was arrested at the Victoria Barracks in breach of the undertaking by the Director that he will not be arrested during the interview. 20

Dated the 10th day of December, 1980

(Sd.) Brook Bernacchi, Q.C.
Leading Counsel for the Appellant

(Sd.) Sammy Lee
Junior Counsel for the Appellant

Sd: Kwan & Kwan
Kwan & Kwan 30
Solicitors for the Appellant

Re: Appeal No.188 of 1980

RECEIVED from Messrs. Kwan & Kwan, Solicitors
the within copy Notice of Appeal

.....
Received on: 10/12/1980
at: 3:40 p.m.

INDORSEMENT OF SERVICE

This Notice of Appeal was served by me on Wednesday, the 10th day of December 1980 at 3:40 p.m. by leaving a copy of the same at Room 220, Central Government Offices Building, Central, Hong Kong. 40

Indorsed on the 10th day of December, 1980.

Sd:
(Wu Kin Shun)

Clerk to Messrs. Kwan & Kwan, Solicitors for
the Appellant.

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RESPONDENT'S NOTICE

No.11
Respondent's
Notice

1980, No. 188
Legal Aid No.M/LA 1772/80 (NMGS)

12th December
1980

IN THE COURT OF APPEAL

(ON APPEAL FROM THE HIGH COURT FULL
BENCH, Miscellaneous Proceedings
No. 1019 of 1980)

10

IN THE MATTER OF Ng Yuen Shiu
also known as Ng Kam-shing

- and -

IN THE MATTER OF an Application
for a Writ of Habeas Corpus ad
Subjiciendum

- and -

IN THE MATTER OF an Application
for an order of Certiorari and
an order of prohibition

BETWEEN:

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NG YUEN SHIU also known
as NG KAM SHING

Appellant

- and -

ATTORNEY GENERAL

Respondent

RESPONDENT'S NOTICE

30

Take Notice that the Attorney General
intends upon the hearing of the appeal under the
Appellant's Notice of Appeal dated the 10th of
December 1980 from the Order of the Full Bench
of the High Court dated the 4th of December 1980
to contend that the said Order should be
affirmed on grounds additional to those relied
upon by the Full Bench, namely :-

1. That as a matter of law no estoppel
could arise in this case because
estoppel cannot operate to prevent or
hinder the exercise of a statutory
discretion which is intended to be
exercised for the benefit of the public
and the powers of the Director of

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Immigration under both Section 19(1)
(b)(ii) and Section 32(3A) of the
Immigration Ordinance (Chapter 115)
are statutory discretions intended to
be exercised for the benefit of the
public of Hong Kong;

2. that in all the circumstances of the
case the opportunity to be heard
afforded to the Appellant by the
Director of Immigration's officers was 10
sufficient to satisfy the requirements
of the rules of natural justice and
the doctrine of fairness had those
requirements been applicable in this
case.

Dated the 12th day of December 1980

(Sd.) Brian Barlow

(B.G.J.Barlow)

Counsel for the Respondent

To:- Messrs. Kwan & Kwan, 20
Solicitors for the Appellant,
99, Des Voeux Road, C., 18th floor,
Hong Kong Industrial and Commercial Bank
Building,
Hong Kong.

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No. 12

JUDGMENT OF THE COURT
OF APPEAL, McMULLIN V.P.

IN THE COURT OF APPEAL 1980 No. 188
(Civil) 30

BETWEEN:

NG Yuen-shiu also known
as NG Kam-shing Appellant

- and -

ATTORNEY GENERAL Respondent

Coram: McMullin, V.P., Li, J.A. & Baber, J.
Date: 13th May, 1981

J U D G M E N T

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McMullin, V.-P. :

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The appellant was born in China but was taken to Macau by his parents in 1951 when he was only three years of age. In 1967 he entered Hong Kong illegally and thereafter worked in various garment factories having completed a course of apprenticeship in the repair of sewing machines.

10 He first came to the attention of the authorities in 1976 when he applied for an identity card. However, instead of achieving lawful status as a citizen he was removed to Macau under a removal order signed by the Governor in March of that year. One month later he returned once more to Hong Kong illegally. Another four years went past without his being detected by which time he had, by his own account, prospered to the extent that he had
20 become co-owner of the Kam Shing Garment Factory with the registered proprietor, Mr. KWONG Chi-pang.

Following a change in the law it became necessary for all Hong Kong residents to carry proof of identity. The Immigration (Amendment) (No.2) Ordinance 1980 also prohibited the employment of illegal immigrants. In the same month on the 23rd of October the government
30 announced the end of what had been popularly known as the "reached base" policy whereby immigrants from China would not be repatriated if they managed to reach the urban areas. This customary amnesty had never been granted to immigrants from any other areas, including Macau. Televised announcements proclaiming the change in practice were broadcast between the 24th and 26th of October.

40 A deputation of persons who had entered Hong Kong illegally from Macau went to Government House on the 28th of October and submitted a petition there. A statement of the Government's policy in the form of questions and answers was read to them by Mr. LAM Yan-kwong, an Assistant Principal Immigration Officer. It is not in dispute that the text of this announcement which had been authorised by the Secretary for Security truly represented the policy of the Government in this matter. The questions and answers were as follows :

50 "Q. Should we report to Victoria Barracks?

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A. No. You should go to Li Po Chun Chambers individually from 9 o'clock tomorrow morning as have over 2,500 people to-day.

Q. Will we be arrested?

A. No. Not during these interviews.

Q. Will we be given identity cards?

A. Those IIs from Macau will be treated in accordance with procedures for IIs from anywhere other than China. They will be interviewed in due course. No guarantee can be given that you may not subsequently be removed. Each case will be treated on its merits".

10

Mr. Lam also answered some questions put to him at the same time by members of the deputation. He told them that each case would be judged upon its merits and would be investigated before decisions were reached. He stressed however that there had been no general "amnesty".

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The appellant was not present at Government House and did not hear the pronouncement but on the morning of the 28th of October having read a government appeal in a newspaper, addressed to all illegal immigrants, he went to register with the Immigration Department at the office in the Li Po Chun Chambers on that day. He was told to attend the Immigration Clearance Office at Victoria Barracks on the following morning, the 29th. On the evening of the 28th he saw a television programme concerning the statement which had been made by Mr. Lam to the deputation at Government House.

30

Some question was made at the hearing before the Full Bench as to whether that programme, and certain newspaper reports published about the same time, had accurately reflected what had been read out by Mr. Lam. The Full Bench however took the view that the words actually spoken by Mr. Lam constitute the only governmental representation which may be considered. I am in respectful agreement with that view, and indeed the hearing of the appeal has been conducted throughout upon that basis. It has also been accepted throughout these proceedings that, although not personally present when the policy statement was declared by Mr. Lam, the appellant is to be regarded as one to whom that statement was personally made.

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10 After some preliminary questioning at Victoria Barracks on the morning of the 29th of October the appellant was taken to Victoria Immigration Centre in Victoria Prison where he was detained. He was interviewed later on the same day by Mr. KWONG Kam-yuen, an Immigration Officer. The interview consisted of questions put to the appellant and recorded together with the answers given by him in a formal document known as an interview report.

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20 He was kept in detention under the powers conferred by section 26(a) of the Immigration Ordinance until the 31st of October when the chief immigration officer submitted an application for a removal order to the Director of Immigration. On the 31st of October Mr. CHEUK Koon-chau, the Acting Chief Immigration Officer, submitted an application for a removal order to the Director of Immigration. The appellant continued to be in detention until liberated upon bail upon the making of the application for the writ of habeas corpus on the 6th of November.

30 In the meantime the Director had made a removal order which was served upon the appellant on the 31st of October. He appealed against this order to the Immigration Tribunal under section 53(a) of the Ordinance. The Tribunal dismissed his appeal without hearing him under the powers conferred by section 53(c). He was notified of this decision of the 3rd of November. It is provided in section 53(d) that this decision of the Tribunal is final. The Tribunal, however, in dealing with the appeal is confined to the consideration solely of the question whether the appellant has the right under section 8 of the Ordinance to land in Hong Kong and whether at the time of making of the removal order he had the permission of the Director to remain.

40 At the hearing of the application for the writ the appellant was permitted to apply under Order 53 for judicial review. The applications included an application for an order of certiorari to quash the order of removal dated 31st of October and also to quash the order for removal which had been made by the Governor in 1976. It included also an application to quash the decision of the Appeal Tribunal and an application for an order of prohibition to restrain the Director from executing the removal order of the
50 31st of October.

Before the Full Bench counsel for the appellant sought to argue firstly that execution

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of the order should be prohibited on the ground that the appellant was indeed a person with a right to land in Hong Kong. This required him to contest the validity of the decision in the Attorney General v. CHEUNG Kam-ping (1) a decision of the Court of Appeal of this territory.

That case was concerned with the question whether an illegal immigrant who had entered the Colony unlawfully and remained unlawfully could nevertheless claim to be a Chinese resident with a right to land in Hong Kong under section 8(1) of the Immigration Ordinance by virtue of his having been "ordinarily resident" in Hong Kong for a period of seven years. Such a person would, under the law, have a right to remain in Hong Kong.

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The appellate court held that "ordinarily resident" meant "lawfully ordinarily resident" and rejected an argument that lawful residential status had been achieved by virtue of residence for seven years undetected, although initially unlawful, on the ground that the immigrant could no longer be prosecuted for an offence under section 38(1) of the Ordinance because of the elapsing of the limitation period in section 46(2) thereof.

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At the hearing of the present case before the Full Bench counsel for the appellant sought to persuade the court that it was not obliged to follow the decision in CHEUNG Kam-ping but the court did not agree and he was so advised in the course of the argument and thus did not further develop his contention that the appellant had acquired a right to residence in Hong Kong. The remainder of the argument before the Full Bench concerned the matter with which we in this court have been primarily concerned on the hearing of the appeal viz.: whether the orders sought ought to be granted because of a failure on the part of the Director of Immigration to observe the rules of natural justice in making his removal order.

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Before this court however Mr. Bernacchi for the appellant has renewed both of these contentions. The Court of Appeal in CHEUNG Kam-ping included two members of the present court, myself and Li, J.A. Although he made no

(1) Civil Appeal No.58 of 1980.

point of the matter, counsel might well be forgiven for believing that his argument to persuade us that the court had erred in its previous decision was favoured by the fact that, as it happens, the two members of the present court who sat then came to differing opinions, the decision being a majority decision. Nevertheless, all members of the present court were satisfied that the decision reached on the previous occasion by all three judges could by no means be said to have been arrived at per incuriam; nor were we prepared to accept the alternative proposition advanced by Mr. Bernacchi that, even if not per incuriam, the court was entitled to review its previous decision since the liberty of the subject was involved and to overrule it if, as presently constituted, it came to the conclusion that that decision was wrong. We indicated that the reasons for so holding would be given in fuller measure when we came to consider the appeal at large and to this question - touching upon the principles of stare decisis - I will return in the concluding part of this judgment.

The greater part of the argument upon the appeal was therefore concerned with the question of the principles of natural justice and whether they could be said to apply to the circumstances with which the Director of Immigration was dealing.

Sir Denys Roberts, C.J. and Rhind, J. the judges of the Full Bench, were in no doubt that the announcement made by Mr. Lam at Government House constituted an undertaking emanating from the highest Immigration Authorities to all illegal immigrants in the position of the appellant that (a) they would not be arrested while the promised interviews were proceeding; and (b) each individual case would be heard upon its merits. They were also satisfied that the first of these undertakings had been broken. This they found could have no effect in law in vitiating the removal order since, however shabby the treatment accorded to the appellant and however justified his sense of grievance as a result of it, the arrest and detention, even if they were illegal (and the court said they were not), could have no direct relation to the questions to be decided by the Director in considering whether or not to make the order. With respect, this seems to be entirely right and Mr. Bernacchi does not now rely upon this as constituting in itself a diriment impediment in the way of the order. This was enlisted,

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however, as a potent indication of the peremptory and high-handed treatment of the appellant by the Authorities which ended in a failure to accord to him the hearing upon the merits which he had been promised.

This latter point involves the substance of the case viz.: the question whether the Director was under a duty to act fairly, a phrase which in the most recent authorities has tended to oust, at least in relation to acts of a purely administrative or executive and non-judicial nature, the more traditional concept of "natural justice".

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The Full Bench concluded that there was no such obligation upon the Director in this case. But before I come to consider the argument in that regard it is convenient to note that the Full Bench, for completeness, did consider the question of the way in which the interviews had been conducted and concluded that the cases of these immigrants, including that of the appellant, had been heard upon their merits.

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However, on the material before the court, which included affidavit evidence from the appellant, the Full Bench concluded that he had not been accorded a sufficient opportunity for advancing "humanitarian" reasons why the order should not be made against him. The interview had followed the lines indicated by the interview report which allows for various questions to be put and which contains a series of "boxes" to be ticked by the interviewer in accordance with the answers given. It was accepted that the interviewer had not specifically invited the appellant to advance any humanitarian reasons which might affect the Director's decision although the report form allocates a particular box to that query. The court accepted the appellant's evidence that he had not been allowed to do more than answer these specific questions. In the result, it was said, there had been, to this extent, a failure to "act fairly" on the part of the Director and while refusing the orders sought the Full Bench suggested that the Director might be disposed to consider this aspect of the case before the removal order was executed.

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Despite an appearance of conflict between these findings I think they are to be interpreted as meaning that the appellant did not receive that full measure of a fair hearing which would constitute "fair play in action" and that the

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10 hearing "on the merits" which the Full Bench found had been accorded had nevertheless not fully complied with the duty to act fairly. It should be noted that this is the narrow factual base upon which the appeal stands. It is not on one footing with those cases in which the complaint was of a total want of any hearing prior to the carrying out of the executive or administrative act complained of. The respondent's notice in the present case seeks to have the decision of the Full Bench affirmed on the ground that the appellant was accorded such full measure of natural justice as the circumstances of his case demanded. Mr. Bernacchi, however, maintains that there may have been many aspects of his situation which might have had a strong humanitarian appeal had the appellant been given an opportunity of exposing them to the investigating officer. In effect, he maintains, the appellant was not given a proper hearing at all. The Full Bench while expressing no opinion as to the possible existence of any such humanitarian factors clearly supports counsel's contention that the appellant was deprived of the opportunity of advancing them if they existed. I turn now to the principal point in the appeal.

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Was there a duty to act fairly?

30 A very large number of cases has been opened to us. They include most of those names which have become familiar to the courts in recent years when any question relating to the nature and application of natural justice has come up for discussion.

40 The Full Bench set off upon its inquiry from the standpoint of the durable ground rules established by Lord Upjohn in Durayappah v. Fernando (2) he says that there are three matters which must always be considered in deciding whether the principles of natural justice are to be applied. He says :

50 "These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other."

(2) (1967) 2 A.C.337 at p.349

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No question is made of this statutory right for the Director to remove illegal immigrants and it is not suggested that the order of removal, regarded as a statutory sanction, may not be a severe interference with the interests of the immigrant. The court found however that the appellant as an alien without a right to be in Hong Kong was not entitled to the procedural protection implied in the notion of natural justice, or the duty to act fairly.

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They relied in particular upon R. v. Brixton Prison Governor, ex parte Soblen (3) and Schmidt v. Secretary of State, Home Affairs (C.A.) (4) and Salemi v. Minister for Immigration and Ethnic Affairs (No.2) (5), as compelling recent authority against any right of a restricted class of persons, including aliens, to be accorded such procedural protection. Needless to say the Full Bench was not holding - nor has it been suggested in argument before us - that aliens possess no rights under the law. What these cases were said to establish was that the immigrant's status as an alien with no right to be in or remain in the territory in itself precluded any argument that he had a right to be heard before being excluded therefrom.

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Mr. Bernacchi points out that these cases, as one might expect in this area of the law, afford support which is less than wholly unequivocal for any absolute and general rule that aliens need not be heard. He points out that Soblen and Schmidt, and the older case of Venicoff (Leman Street Police Station; ex parte Venicoff) (6) which was also relied upon in this connection, are all cases in which, firstly, deportation proceedings were not in issue and, secondly, were concerned with persons who were thought to be undesirable aliens either because their activities were contrary to public order or else adverse to national security.

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Dealing with the growing inclination of courts to require decision makers to "act fairly" in relation to affording a hearing to persons likely to be affected by administrative or executive acts Professor De Smith (Judicial Review of Administrative Action) puts the principle upon which the Crown relied in the present case in the following somewhat guarded terms: (page 178 4th Edition)

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- (3) (1963) 2 Q.B. 243
(4) (1969) 2 Ch. 149
(5) (1977) 14 A.L.R. 1
(6) (1920) 3 K.B.72

"However, one can point to classes of persons (notably aliens, prisoners, scientologists and gaming club proprietors) whose interests the courts have been reluctant to grant meaningful procedural protection."

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10 The footnote to this part of the text refers, amongst other cases, to Soblen, Salemi, Schmidt and Venicoff. Even thus stated it may be said that the principle is somewhat called in question by obiter dicta of two eminent judges involved in two of the cases which are said most strongly to support it. This, in Soblen Lord Denning while holding that deportation formed an exception to the tenor of decisions which for nearly a hundred years had established that no person should be deprived of liberty or property without a hearing nevertheless went on to say (at page 298) :

20 "I reserve my opinion, however, on the following point; it may be a question whether, after a deportation order is made and before it comes to be executed (by his being expelled from the realm), an alien may not in some circumstances have a right to be heard."

30 Again in Schmidt Lord Widgery while agreeing with the other judges, including the Master of the Rolls, in the opinion that the scientologist students, being aliens without any licence or right to remain in the United Kingdom, had no right to be heard on an application by them to the Home Secretary for an extension to permits for a limited stay, nevertheless observed (page 911) :

"Of course, very different considerations may arise on the making of a deportation order."

40 I do not think Reg. v. Board of Visitors of Hull Prison (7) is of any assistance to counsel in this regard. The House of Lords in that case, reversing the decision of the Divisional Court, held that the decision of a board of visitors meting out punishments to prisoners who had taken part in a riot in the prison was subject to judicial review by way of certiorari. The basis of the decision was that the visitors were carrying out what was substantially a judicial function. No question was raised or decided in that case as to whether, upon any such hearing

50 by the board of visitors, there was a right on the

(7) (1979) 2 W.L.R.42

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part of the prisoners to be heard or represented before the punishments were handed down.

There is perhaps more to be said for counsel's point arising from the case of Reg. v. Secretary of State for Home Affairs ex parte Hosenball (8) in which the Court of Appeal held that the appellant, against whom the Home Secretary had made a deportation order on the ground that it would be conducive to the public good, was not entitled to be supplied with particulars of the allegations which had prompted the making of the order. It was held that where national security was involved the ordinary principles of natural justice were modified for the protection of the realm. Hosenball was an alien who was being excluded from the realm on grounds of national security based upon confidential information relating to what the Home Secretary regarded as journalists activities detrimental to the good of the state. All the judgments stressed the need for confidentiality in such matters and nowhere in the judgments do we find any reference to any more general exclusionary rule based simply upon the appellant's status as an alien.

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Counsel resorts to the decision of Lord Denning, M.R. in Schmidt for another purpose. The Full Bench had no difficulty in distinguishing the cases of Re H.K. (An Infant) (9) and A.G. v. Ryan (10) from the present case because in each of those cases peremptory executive action denying a full right of hearing to a person (in the one case seeking admission to the U.K. and in the other seeking citizenship of the Bahamas) was reprovved on the ground that the applicant in each case had, under the law, a right to what he sought provided he could show that he came within the terms of the law. To my mind that is a clear distinction. The status of the present appellant is not even that of a bare alien. He has already been refused leave to remain in Hong Kong. He is not a Chinese resident. He stands before the court as one who at best has a hope or expectation of attracting the sympathetic consideration of the Director who has a discretion under section 13 of the Ordinance to authorize him to remain subject to such conditions of stay as the Director sees fit to impose.

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(8) (1977) 1 W.L.R. 766
(9) (1967) 2 Q.B. 617
(10) (1980) 3 W.L.R. 143

10 It is however upon this expectation that Mr. Bernacchi primarily relies. He has support once more from the judgment of Lord Denning, M.R. in Schmidt. It will be recalled that what was under consideration in that case was the application by persons who had had a permit to stay in the United Kingdom to have such permits extended after they had elapsed. The court found that they had no right to a hearing before the decision to refuse such extension was made. But, looking at the matter more generally, the Master of the Rolls, said (page 17) :

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20 "If his permit is revoked before the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right - and, I would add, no legitimate expectation - of being allowed to stay. He can be refused without reasons given and without a hearing."

Widgery, L.J. in the same case seems to support this view of the matter.

30 This notion of a legitimate expectation was critically examined by the Australian High Court in Salemi. Barrwick C.J. took the line which Mr. Barlow urges upon us in the present case viz.: that courts of law are concerned with rights in the legal sense and must have nothing to do with the enforcement of moral suasions.

40 In Salemi a person who was a prohibited immigrant, and therefore an alien without a right to be in the territory, sought to take advantage of an amnesty declared by the relevant governmental authorities for the purpose of legitimating the presence in Australia of just such persons as he. It was assumed at the hearing of the case that he did conform with all the requirements stated in the published amnesty documents and was therefore a person who on the face of it was entitled to receive legitimation of status. This was nevertheless refused and he thereupon brought proceedings in the High Court seeking declarations and an injunction to prevent his deportation from Australia. The bench of six judges was evenly divided on the issue but under the Australian procedural arrangements the vote of the Chief Justice counts as two and the claim of the plaintiff was dismissed by a majority
50 which was composed of the Chief Justice and two

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of his fellow judges. The majority could find nothing in the relevant legislation - the Migration Act of 1958 - to support the idea that such an alien had a right to the protection of the rules of natural justice.

For the plaintiff it was argued that the amnesty had given him - in accordance with the prescription of Schmidt and the Secretary of State for Home Affairs ex parte Hosenball - a "legitimate expectation" of being allowed indefinitely to stay in Australia. At page 7 the Chief Justice says :

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"I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than a meaning which expresses the concept of entitlement or recognition by law. So understood, the expression probably adds little, if anything, to the concept of a right."

It is to be noted that the legitimate expectation emerging from Schmidt and deployed for the plaintiff in Salemi was in each case a legitimate expectation of being allowed to remain. Gibbs J., who agreed with the Chief Justice, did not say that such a legitimate expectation would not secure a right to be heard but he found that "a prohibited immigrant as such has no legitimate expectation of remaining in Australia". Aickin, J. on this point is content to agree with what had been said by Gibbs, J.

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Of the dissenting judges, Stephen, J. and Jacobs, J. take the view that such a legitimate expectation of being allowed to remain could found a right to be heard.

On the facts of the present case I cannot see that the appellant had any such "legitimate expectation" of being allowed to remain at all. There was in his case no question of a permit which had been revoked before its due expiry date nor was he made the subject of an offer such as affected the prohibited immigrants in Salemi and which in the plainest terms excited a hope, one would think amounting to a certainty, that, provided the prescriptions detailed in the official statements were fulfilled, indefinite stay would be granted. So far as that aspect of the matter is concerned the appellant is as little covered by Schmidt and Salemi as he is by in Re H.K. (An Infant) and A.G. v. Ryan .

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10 That is, however, not the end of the matter. Mr. Bernacchi falls back upon what seems to me to be firmer ground. What he says is that even if the appellant had no legitimate expectation of being allowed to remain in Hong Kong he had at least the legitimate expectation that the undertaking given to him by the authorities that his case would be heard upon the merits would be honoured. Here we come to the case which seems to be most directly in point.

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20 In R. v. Liverpool Corporation ex parte Liverpool Taxi-Fleet Operations' Association (11)
The local authority had given an express undertaking to members of the association that the existing number of taxi licences would not be increased without their being given an opportunity to make representations before the policy was changed. The undertaking was broken and, without hearing from the association, the number of licences was increased by fifty. The association applied to the Divisional Court for orders of prohibition mandamus and certiorari against the Liverpool Corporation. The Divisional Court refused the application but on appeal it was held that the association was entitled to the orders which they sought although, in the event, only prohibition was granted. The court held that the undertaking was compatible with the corporation's statutory duty and therefore the corporation must honour it.

30 Professor De Smith contrasts this case with the decision in Salemi which he sees as in conflict with it. It may be questioned however whether the two cases stand upon quite the same footing. Barrwick, C.J. himself in Salemi deals with the Liverpool Taxi case in this way (page 8) :

40 "The undertaking in terms required the consultation of the applicants. It was thus held that the corporation must do so, that being required as a matter of fairness. Having found the duty to act fairly because of the binding undertaking to consult, the court said that to act in breach of a promise or undertaking without affording a hearing of affected interests was to act unfairly. It might be said of this case that it does not really depend upon the implication of a duty to accord natural
50 justice. It could be said to turn upon the terms of an express undertaking."

Whatever is to be said of that view the

(11) (1972) 2 Q.B. 299.

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Liverpool Taxi case does seem to me to come closest to the circumstances of the present case inasmuch as both cases were concerned with an express undertaking that parties were to be heard. Professor De Smith does indeed regard the case as having something of an exceptional character. At page 181 dealing with the scope of the audi alteram partem rule today he refers to the Liverpool Taxi case as "the one case that is at all suggestive of possible future development in this area....". He goes on to say that the peculiarity of its facts makes it difficult to estimate its wider significance. He makes the very tentative but surprising suggestion that the courts might possibly develop it in the direction of recognising the need for procedural safeguards to protect the rights of interested groups and individuals by giving them prior notice and a right to present arguments before decisions even of a legislative nature are made. The courts may well be slow to follow such a bold lead but far short of that, the case itself may surely be considered adequate cover for the proposition that any undertaking of the specific kind with which we are now concerned ought in fairness to be honoured. 10

The Full Bench did refer to the Liverpool Taxi case but only in relation to the broken promise concerning arrest during the investigations and then only in relation to the proposition stated at page 104 of De Smith that 30

" a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others."

The court relied on the majority decision in Salemi as being in alignment with the decisions in Soblen and Schmidt on the want of any right in an alien to a fair hearing. Nevertheless, having quoted a passage which appears in the judgment of Lord Denning in Selvarajan v. Race Relations Board (12) where the Master of Rolls says that any person subjected to pains or penalties, or in some way adversely affected by an investigation and report, should be told of the case made against him and be given an opportunity of answering it, the learned Chief Justice goes on to say : 40

"This passage, taken by itself, could be said to oblige the Director to 'act fairly' in dealing with Removal Orders, 50

(12) (1976) 1 All E.R. 12 at p.19

since an alien seeking permission to enter may certainly be adversely affected by the decision. However, though this may be accepted as a proper statement of the general principle the exception as to aliens remains at common law as the Full Bench decided in WONG Bat Kien (M.P. No. 440/1973 - unreported).

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10 Had it been open to us to do so, we might well have been inclined to prefer the dissenting judgment of Murphy, J. in the Salemi case."

20 It would appear that the Full Bench decision there referred to should properly be entitled LEUNG Pik-kin the name given to the court being presumably a faulty rendering of the Chinese characters. Counsel are agreed that this is in any event a mistaken reference. The sense of the passage which I have quoted is clearly that the Full Bench is not prepared to depart from the ruling of the Court of Appeal in Schmidt. This court is however not bound by that decision although we should be slow to depart from it unless the latest trend of authority in England and elsewhere should draw us towards a more liberal approach to the status of an executive act in such special circumstances as we are now considering.

30 The judgment of Murphy J. in Salemi is of particular interest inasmuch as he appears to be the only one of the six judges who went so far as to find that the terms of the amnesty, emanating as they did from an authoritative government source, had the effect of altering the status of the plaintiff so that when he approached the court he was not in fact a prohibited immigrant at all. That was the basis of his decision. But having said so he went on to consider the question of the application of natural justice in relation to the power to deport an alien under the relevant section of the Migration Act. At page 48 he says :

50 "The power to deport, like other powers, is to be exercised bona fide, for the purposes for which it was created and with due regard to the interests of the persons affected by its exercise. The power must be exercised in accordance with the principles of natural justice. Unless circumstances make it impracticable, the person against whom the order is contemplated must be given the opportunity to

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contend that the order should not be made....But the power is conferred in discretionary terms. The Minister may (but need not) order deportation. The person may, and no doubt often will, wish to put facts to the Minister and make submissions why the Minister should not exercise the power because of, for example, hardship to the person or others or suitable undertakings. The requirements of natural justice depend on the circumstances.....If the Minister orders deportation without giving the person an opportunity to put his case, the order should be set aside." 10

Those were, one would think, the passages which attracted the sympathetic attention of the Full Bench in this case. Equally, in the present case the power conferred is a discretionary power. That is plain from the terms of section 19 themselves and there is in addition the discretion, to which I have already referred, under section 13. 20

The fact that what we are dealing with here is a removal order under section 19 and not a deportation order under section 20 has been enlisted by both sides in fortification of the opposing arguments. So far as persons in the position of the present appellant are concerned an order made, as is the present order, under section 19(1)(b)(ii), on the face of it indicates nothing more adverse to his character than that he has committed an offence under section 38 and that he is to be sent out of the territory pursuant to a policy that such illegal immigrants are not to be given shelter within it. A person removed by a deportation order under section 20, however, incurs the additional odium that such orders are only made in respect of persons who have been guilty of one or more of the criminal offences specified in section 2(a) or if, under paragraph (b), they are such as the Governor-in-Council considers advisable to deport for the public good. 30 40

On the one hand it is said that so severe an interference with the life and property of an immigrant who is otherwise not said to be undesirable should not be undertaken without giving him in fuller measure an opportunity to be heard than should be accorded to one who is already tainted by criminality and clearly of an undesirable character. 50

On the other hand it is said that where a person alleged to be undesirable or criminal in character is being deported under section 20 it is the more desirable that he should be given an opportunity of showing that the opinion thus held of him is false.

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10 I see no advantage in endeavouring to resolve these opposed positions and such weight as must be given to the decision in Salemi is not to my mind affected by the consideration that the court in that case was dealing with a deportation order rather than an order of the kind with which we are dealing here.

20 Mr. Barlow asks us not to follow the decision of the Court of Appeal in the Liverpool Taxi case. It is of course not binding upon this court but in addition to that he asks us to say that it is wrongly decided. He discerns in it a dubious endeavour on the part of the Master of the Rolls to extend further still the notion of promissory estoppel from its original seed-bed in the High Trees into an area of administrative action which, counsel would say, affords no fruitful soil for such further development.

30 Against that case he sets the decision of the Court of Appeal in Maritime Electric Co.Ltd. v. General Dairies Ltd. (13) and the decision of the Divisional Court in Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd. (14).

40 In the former it was held that the Electric Company was under a statutory duty to collect charges for electricity at the proper statutory rate and that it was not estopped from recovering the sum claimed by it by reason of the fact, relied upon by the respondent company, that the latter had been charged and had paid a sum very much smaller than the statutory sum as a result of a miscalculation wholly attributable to an error on the part of the Electric Company.

This decision was applied in the Southend-on-Sea case where the principle was extended to the exercise by a planning authority of a statutory discretion conferred by the Town and Country Planning Act of 1947. The point at issue turned on whether certain premises had formerly been used as a builders' yard. The plaintiffs

(13) (1937) A.C. 610
(14) (1962) 1 Q.B. 416

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had acquired the premises and wished to use them for that purpose. If they had been so used formerly there was no need to have any planning permission. The plaintiffs were told by the borough engineer that the premises had so formerly been used and that no planning permission would be needed. In reliance upon that assurance the company went ahead and established the yard for the purpose required. The planning authority then notified the company that evidence had come to light that the premises had formerly not been used as a builders' yard. The authority had power under section 23 of the Act in their discretion to serve an enforcement notice upon the occupier which would compel him to cease operations until planning permission had been achieved. Upon the service of such a notice the plaintiff appealed under the Act to the court of the justices of the area. The court held that the authority was estopped from insisting upon the planning permission but the decision was reversed upon appeal. Lord Parker, C.J. said (page 424):

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"After all, in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion. There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion. Similarly, as it seems to me, an estoppel cannot be raised to prevent or hinder the exercise of the discretion."

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Although this matter was argued as one of estoppel on behalf of the appellant before the Full Bench Mr. Bernacchi at the hearing of the appeal wished to de-emphasize the estoppel aspect of the matter and asked us to consider the case of his client simply under the rubric of the doctrine of fairness. In his turn he sets against Mr. Barlow's two cases the Court of Appeal decision in Lever Finance v. Westminster L.B.C. (15) where the council was held to be bound by representations made by one of its officers that no further planning permission was needed in respect of certain minor alterations submitted by the plaintiff company in plans already approved by the council. At page 230 Lord Denning, M.R. says as follows :

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"If the planning officer tells the developer

(15) (1971) 1 Q.B. 222

that a proposed variation is not material, and the developer acts on it, then the planning authority cannot go back on it. I know that there are authorities which say that a public authority cannot be estopped by any representations made by its officers. It cannot be estopped from doing its public duty: see, for instance, the recent decision of the Divisional Court in Southend-on-Sea Corporation v. Hodgson (Wickford) (1962) 1 Q.B. 416. But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be."

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Wells v. Minister of Housing and Local Government (16) and Re L. (A.C.) (An Infant) (17) are cases which speak in a similar sense.

Dealing with the question of the degree to which an administrative body may lawfully fetter its own exercise of discretion Professor De Smith at page 316 says as follows :

"Moreover, when an agency openly prescribes the criteria upon which it proposes to decide it may thereby raise legitimate expectations in those who satisfy them and thus create an interest that in fairness should be given some procedural protection. There may also be circumstances in which an authority may not depart from its previously announced policy without affording a hearing to those adversely affected by it."

The Liverpool Taxi case is once more cited in support of the latter part of that proposition. It may be conceded that where a discretion of the kind reposed in the Director of Immigration is to be exercised the benefit of the public at large is a paramount consideration. But in the circumstances of this case I do not see that we are compelled to choose between the competing

(16) (1967) 1 W.L.R. 1000
(17) (1971) 3 All E.R. 743

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attractions of Lever Finance Ltd. and the
Liverpool Taxi cases on the one hand and the
Maritim Electric and the Southend-on-Sea cases
on the other.

If the court were to decide that the appellant had not had a hearing of the kind which he had been promised there could, to my mind, be no question of fettering the Director's discretion by an order which would have the effect that the appellant should now have what he was promised. To say otherwise would be to suggest that the promise made was, as it were, tongue in cheek and that the Director had in mind something curtly formal and inadequate rather than a true inquiry into the individual circumstances of each case upon its merits. We should be very reluctant to attribute anything of that kind to the Director or to his representative who made the pronouncement upon which the appellant now relies. Rather is it to be supposed that the Director was anxious to have a full exposition of all relevant circumstances, including such as might be favourable to the appellant, in order that he, the Director, could fairly exercise his discretion. He is not to be presumed to wish to exercise his discretion upon inadequate information or to put more succinctly - unfairly. Looked at in this way the order of the court, provided only that it was itself soundly based on a perception that the Director may have been deprived of relevant and helpful information, would be removing rather than applying a fetter to the due exercise of his discretion by the Director.

Where there is an honest desire to act justly, the want of pertinent information is just as much a fetter in this area of human conduct as in any other. In this regard I am happy to adopt what was said by Stephen J. in the Salemi case the more so because it enlists a further notable authority. Thus at page 34 he says :

"When the discretionary grant of a licence, permit or the like carries with it a reasonable expectation of, although no legal right to, renewal or non-revocation, summarily to disappoint that expectation is seen as unfair; hence the requirement that the expectant person should first be heard and this no doubt as much to aid those who exercise discretions in pursuing the goal of a just result as to safeguard

the interests of the expectant party.
In the Liverpool Taxi case Roskill, L.J.
adverted to this aspect when he said (1972)
2 Q.B. at p.310, in disposing of a sub-
mission that the exercise of a statutory
discretion was being fettered, that to
require a municipal council to hear
representations before making a decision
would 'assist the council to perform rather
than inhibit the performance of its
statutory duties'."

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If it be necessary to say that this narrower
aspect of a legitimate expectation gives rise
to a right to be heard - so be it. Understood
as a legally enforceable right it may be
regarded as one of a somewhat attenuated character,
being in a sense but the mirror image of a right
which the Director himself would surely wish
to exert viz.: the right to insist that he be
not impeded in the exercise of his discretion by
any demonstrable inadequacy in the information
laid before him at his request. Perhaps the
better way of putting it would be to say that,
taken together, these "rights" invoke the duty
of the court to see that justice is manifestly
seen to be done.

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Notwithstanding the note in the White Book
at pages 826 and 827 dealing with applications
for judicial review, to which Mr. Barlow referred
us, I note that in the Liverpool Taxi case where
the applications before the court were for manda-
mus certiorari and prohibition the several judges,
while not stating that certiorari could not issue,
felt that the appropriate order in the circum-
stances was one of prohibition only. I appreciate
that the strict logic of the position I have
adopted might to be said to justify the quashing
of the order. The same might have been said for
the plaintiffs in the Liverpool Taxi case and it
may be that the consensus to refuse certiorari
in that case was in some sense an acknowledgment
that the right discerned in the plaintiffs was
not of a character sufficient to impel the
quashing of the council's resolution, although
I think it is clear that the Master of the Rolls
considered that that course was open to the
court. If in the case of subjects the law does
not regard such a failure of natural justice as
necessarily invalidating the act complained of
still less should the court feel bound so to
find in the case of an alien.

I would allow the appeal and order that
prohibition do issue to prevent the execution of

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the removal order. I do not think that it is either necessary or desirable that we should remove the order into this court to quash it. The writ of habeas corpus was quashed by the Full Bench. I would not propose to reinstate it. The effect of this order therefore is that the appellant is reposed once more in the custody of the Director under the removal order. That order may however not be executed until a further opportunity is given to the defendant of putting all the circumstances of his case before the Director. If the Director should alter his opinion the removal order may simply be cancelled.

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The result of such further inquiry is no concern of this court. I would like to stress also that nothing which has been said in this judgment must be taken as indicating either that the court has any view as to what the ultimate result in this case must be, or that the Director is to be criticised in any way for making the order as he did. The circumstances of Hong Kong vis-a-vis the Immigration Authorities are too well-known to be reiterated. Working at high pressure and with limited resources of staff in the face of a wellnigh insoluble problem of illegal immigration, involving numbers that are always considerable and occasionally critical, it is not to be wondered at that the processing of individual cases may occasionally fall short of the very highest standards of full and fair investigation.

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Enough has been said already both by the Full Bench and by this court to indicate the limited extent to which that can be said to have occurred in the present case. It is because the effect upon the life of this individual long-time (though illegal) resident is so considerable that we feel that this last ounce of "natural justice" should be afforded to him before the final decision is made. It goes without saying that once the appellant has been heard it is entirely within the Director's discretion as to whether he should go or stay. This court is not and cannot be concerned with the weight of any representations which may thus be made but only with the opportunity to put them forward.

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To this limited extent only I would allow the appeal. That disposes of the question of principal concern. I turn finally to the point which we decided against the appellant at the outset of the argument.

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CHEUNG Kam-ping: stare decisis?

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Had Mr. Bernacchi been able to persuade us to reconsider our decision in CHEUNG Kam-ping and had we come to the conclusion that that decision was wrong in law we would have been obliged to find that his client was a Chinese citizen with a right to land in Hong Kong and to grant all the relief which he seeks.

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Arguing for a reconsideration of the case counsel relied upon R. v. Taylor (18) and P. v. Gould (19). They are both decisions of the Court of Appeal Criminal Division. In the latter, applying the decision in R. v. Taylor, Diplock, L.J. pointed out that the English courts do not apply the doctrine of stare decisis with the same rigidity in the criminal as in the civil jurisdiction. This was confirmed by Widgery, L.J. (as he then was) in R. v. Newsome (20) where he expressly approved what had been said by Diplock, L.J. in Gould.

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The more relaxed practice of the criminal courts is, as counsel points out, related to the need to preserve the liberty of the subject when that has been infringed by the application of a decision which is perceived to have been manifestly in error. Counsel asks us to say that the liberty of the subject is equally in jeopardy in proceedings such as the present even although no criminal charge is actually before the court.

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Mr. Barlow relied upon Davis v. Johnson (21) In that case the Court of Appeal had been obliged to consider a narrow as against a broad interpretation of certain statutory provisions in a case involving a dispute under the Domestic Violence and Matrimonial Proceedings Act 1976. The court by a majority of three out of five members opted for the wider interpretation. In doing so the majority purported to depart from two previous decisions of the court in each of which the narrower interpretation had been applied. The earlier cases were taken before divisions of the court which consisted in each case of three members only. The case went on appeal and the five judges in the House of Lords, opted for the broad interpretation and dismissed the appeal but were unanimously of the opinion that the rule in

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(18) (1958) 2 All E.R. 1970
(19) (1968) 1 All E.R. 899
(20) (1970) 2 Q.B. 711 at p.716
(21) (1978) 1 All E.R.1132

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Young v. Bristol Aeroplane Co. (22) still
applied to civil cases in the Court of Appeal.
The leading opinion of the House on this point
is given in the judgment of Lord Diplock who
at page 1137 says :

"In an appellate court of last resort a
balance must be struck between the need
on the one side for the legal certainty
resulting from the binding effect of
previous decisions and on the other side
the avoidance of undue restriction on the
proper development of the law. In the
case of an intermediate appellate court,
however, the second desideratum can be
taken care of by appeal to a superior
appellate court, if reasonable means of
access to it are available; while the
risk to the first desideratum, legal
certainty, if the court is not bound by
its own previous decisions grows ever
greater with increasing membership and
the number of three judge divisions in
which it sits....."

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We drew the attention of counsel to the
decision of the Privy Council in Attorney General
of St.Christopher, Nevis and Anguilla v. Reynolds
(23). Mr. Barlow received it with enthusiasm
and Mr. Bernacchi sought to distinguish it.

The respondent in that case had been
detained by an order of the Governor purporting
to act under certain emergency powers regulations.
The respondent had been held in custody in dis-
agreeable conditions between June the 11th 1967
and August the 10th 1967. In 1968 he brought an
action against the Attorney General claiming
damages for false imprisonment on the ground that
his detention had been unlawful. An adjournment
was obtained and the matter slept for some eight
years before coming on for trial. Judgment was
given for the plaintiff and the Attorney General
appealed. In dismissing the appeal the Appellate
Court held itself bound by its own decisions in
two previous cases dealing with the same regula-
tions. Upon appeal to the Privy Council it was
held that the regulations were not, as the Court
of Appeal had held, so gravely in collision with
the constitution of the territory as to be incap-
able of being brought into conformity with it.
Although allowing the appeal the Board said that
the West Indies Appellate Court had been correct

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(22) (1944) L.R. K.B 718
(23) (1980) A.C. 637

in following its own previous decisions. At page 659 Lord Salmon says :

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"Their Lordships considered that the Court of Appeal was right in holding itself to be so bound, although their Lordships have decided that regulation 3(1) was valid for the reasons stated in this judgment. Their Lordships agree with the decision in Young v. Bristol Aeroplane Co.Ltd. (1944) K.B.718 that, save for three exceptions there stated but which are irrelevant to the present case, the Court of Appeal is bound by its own decisions on points of law. The Court of Appeal in England has never since 1944 departed from that decision and the House of Lords has frequently endorsed it, first in Young v. Bristol Aeroplane Co.Ltd. (1946) A.C.163, 169 itself and most recently in Farrell v. Alexander (1977) A.C.59, 92, 105. The opinion of their Lordships' Board and of the House of Lords on this question can, however, be only of persuasive authority. No doubt it would be treated with great respect but it cannot be of binding authority because the point can never come before this Board or the House of Lords for decision. Indeed if a case came before either in which the Court of Appeal had refused to follow one of its own previous decisions on a point of law the appeal would have to be dismissed if the final appellate tribunal concluded that the previous decision was wrong."

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Notwithstanding that reservation Lord Salmon went on to consider the judgment of Isaacs, J. who in 1930 in the Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia (24) had proposed that the Australian Appellate Court could depart from previous decisions on the ground that :

"It is not, in my opinion, better that the court should be persistently wrong than that it should be ultimately right"

Lord Diplock continues :

"Attractive as this pronouncement may sound and great as is the reputation of

(24) (1913) 17 C.L.R.261

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Isaacs J., their Lordships cannot agree that the basis upon which he rests his opinion is sound."

He concludes upon the matter a little later (page 660) in the following words :

" In the circumstances such as the present where there is an appeal from the Court of Appeal to their Lordships' Board it is, in their Lordships' view, for the reason stated, most important in the public interest, that the Court of Appeal should be bound by its own previous decision on questions of law save for the three exceptions specified in Young v. Bristol Aeroplane Co.Ltd. (1944) K.B.718."

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These are strong expressions but in deference to a contrary opinion I think I ought to refer to Dataprep (H.K.) Ltd. v. KUO Chi-yung Peter (25) a case to which counsel did not refer. In that case Huggins, J. (as he then was) delivered the opinion of the Full Court which consisted of himself and Pickering, J. He noted that the Full Court in CHENG Pui-wah v. Luen Hop Chi Yip Ltd. (26) had declined to decide whether it was bound by its own previous decisions in civil matters. He grasped the nettle and came firmly to the conclusion that in civil matters as in criminal the Full Court was free to depart from previous decisions which it considered to be erroneous. He said (page 397) :

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"It is emphasised on behalf of the Respondent that the Court of Appeal in England has generally considered itself bound by its own decisions in civil matters and, indeed, so decided by a majority in Gallie v. Lee (1969) 2 Ch. 17. The Full Court is not, however, in precisely the same position as the Court of Appeal for, although an appeal lies from the Full Court to the Privy Council, the Full Court is the final appellate court within the Colony and appeals from Hong Kong to the Privy Council are even more rare than are appeals from the Court of Appeal to the House of Lords."

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I do not think that in the circumstances here we should follow the exceptional practice of the English courts in criminal cases.

(25) (1974) H.K.L.R. 383

(26) (1964) H.K.L.R. 19

10 Mr. Bernacchi's assimilation of this to such cases on the basis that the liberty of the subject is involved does not appear to me to be sound. The whole "natural justice" argument in the present case has turned upon the appellant's conceded status as an alien. For the purpose of that argument he is not to be regarded as in any sense a subject of the Crown. We cannot consider counsel's argument as to stare decisis on any other basis for that would be to concede precisely what the argument seeks to establish viz.: that CHEUNG Kam-Ping was wrongly decided.

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20 There is no doubt that the appellant's liberty has been interfered with by the period of detention pending the execution of the order but that is a very different thing from the interference with the liberty of a subject of the Crown who has been imprisoned under an order of the court in a criminal case when it is perceived that the court, in making the order for his imprisonment, was acting upon a precedent which upon later examination is perceived to have been in error.

30 Of course habeas corpus does apply even in the case of somebody who eventually is shown not to be a subject of the Crown. That will frequently happen in circumstances such as those with which we are concerned in the present case. But the whole purpose of that procedure is to test whether or not the applicant is a subject with a right to remain. If he does not succeed he will not be further detained. He will be set at liberty though not within the territory in which he aspires to be a resident. Therefore I do not think that the criminal cases are a proper headline for this court in the present case.

40 The alternative argument that CHEUNG Kam-ping was decided per incuriam, within the meaning of the first exception to the rule of stare decisis established in the Bristol Aeroplane case was clearly not tenable and counsel did not persist in it. In this matter I would respectfully adopt what was said by Lord Evershed M.R. in Morella Ltd. v. Wakeling (27) :

"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some

50 (27) (1978) 1 All E.R.708 at 718

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inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."

We will shortly have three divisions of the Court of Appeal sitting simultaneously in this territory. As Lord Diplock noted in Davis v. Johnson the need for certainty in the law as propounded at the appellate level "grows ever greater with increasing membership and the number of three judge divisions in which it sits....." One must balance against that consideration the factors adverted to by Huggins, J. in the Dataprep case, and also the reservation expressed by Lord Diplock in the Davis case where he makes "reasonable means of access" to the superior appellate court a desideratum in maintaining the strict rule in relation to the intermediate appellate court. Appeals to the Privy Council are more frequent than they used to be but they are both time consuming and costly. Moreover, we lack any provision in our law such as permits "leapfrog" appeals to the House of Lords from High Court decisions by virtue of the Administration of Justice Act 1969 in England.

The position, both as to authority and as to the present constitution of the appellate court in Hong Kong has altered very considerably since the decision in Dataprep. I would think that in view of the very strong expression used by the House of Lords in Davis and by the Privy Council in Reynolds, and notwithstanding that in the latter case the opinion is said only to be persuasive, the time has come when we should, in civil matters, consider that we are bound by our own previous decisions on points of law subject to the three exceptions stated in Bristol Aeroplane Co.Ltd. v. Young.

Li, J.A.

Li, J.A. :-

This is an appeal from the Full Bench decision to quash the writ of habeas corpus and refuse the issues of orders of certiorari and prohibition. The background of the case are clearly set out in the Judgment of the Full Bench. It is not necessary to go into details.

The appellant is an illegal immigrant from Macau. He had been removed once from Hong Kong

to Macau in March, 1976. He came secretly back to Hong Kong within a month. As a result of a change of policy regarding illegal immigrants from China and an appeal to all illegal immigrants to go to the Immigration Department, certain illegal immigrants from Macau petitioned His Excellency at Government House in the evening of the 28th October, 1980. The proper authority gave the following assurances in the form of questions and answers:

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10

"Q. Should we report to Victoria Barracks?

A. No. You should go to Li Po Chun Chambers individually from 9 o'clock tomorrow morning as have our 2,500 people today.

Q. Will we be arrested?

A. No. Not during these interviews.

Q. Will we be given identity cards?

20

A. Those IIs from Macau will be treated in accordance with procedures for IIs from anywhere other than China. They will be interviewed in due course. No guarantee can be given that you may not subsequently be removed. Each case will be treated on its merits."

30

Prior to this the appellant had, on the morning of 28th October, presented himself to the Immigration Department for permission to remain in Hong Kong. He was told to report to Victoria Barracks the following day. He did so and was arrested, detained and later interviewed. He was asked questions. He was not given a chance to make his presentation. Then a removal order was made against him. Hence this application to the Full Bench for the writ and the orders.

In its Judgment, Full Bench found as a fact that :-

40

(a) the appellant was arrested at Victoria Barracks in the morning of the 29th October, 1980, before the interview and that such arrest was in breach of the earlier assurance given at Government House in the previous evening.

(b) In the course of the interview the appellant was required to answer specific questions put to him only by

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the interviewing officer but was not given a chance to make presentation as to why he (the appellant) should not be removed or allowed to remain in Hong Kong and that to this limited extent the Director of Immigration failed to act fairly towards the appellant.

On questions of law the Full Bench found that the Director in exercising his discretion must act fairly and that the Court had jurisdiction to review his decision if he failed to do so. It also found that the appellant, as an alien illegal immigrant had no right to be treated fairly concerning leave to remain in Hong Kong. In that event the appellant had no right to insist on being heard. While expressing a doubt whether the principle of estoppel apply to erroneous assurances given by servants of the Crown the Full Bench was content to adopt a passage in Professor de Smith's Judicial Review of Administrative Action at p.104 and concluded that a broken undertaking by the Government would not render the arrest of the appellant illegal or vitiate the removal order of the 29th October, 1980 even though the appellant was put in peril by virtue of such an undertaking. 10 20

For the aforesaid reasons the Full Bench quashed the writ of habeas corpus and refused the orders of certiorari and prohibition. Hence this appeal. 30

Apart from the respondent's Notice of Appeal to the effect that in all the circumstances of the case the opportunity to be heard afforded to the appellant by the Director of Immigration's officers was sufficient to satisfy the requirements of the rules of natural justice and the doctrine of fairness had those requirements been applicable in this case; and the 5th ground of appeal filed by the appellant to the effect that the Director had not honoured his undertakings, there is no other dispute in this appeal as to the findings of facts by the Full Bench. Having found that the appellant was permitted only to answer set questions and was not allowed to present his own case on humanitarian grounds the Full Bench said at p.120 of the transcript as follows :- 40

"Are such grounds to be merely derived from such material as emerges from the questions, or should the subject be given 50

10 the chance to state them? We think he
should. It is likely that an illegal
immigrant, being interviewed by an
immigration officer and knowing that his
future is at stake, will be nervous and
perhaps overawed. It would be easy for him
to do no more than respond to questions
and to fail to put forward any special
factors, unless he is asked if there are
any. In the great majority of cases there
will be none. But we think that he should
have been asked whether there were any
humanitarian reasons or other special
factors which he would like to be taken
into account before a decision was reached."

This, in my mind, appears to be in conflict
with its earlier conclusion at p.118 of the
transcript in which it said :-

20 "All these factors satisfy us that each
individual case was considered on its
merits and was investigated by officers of
the department before a decision was
reached by the Director, before whom the
information gleaned by those officers was
placed."

30 Having regard to the findings I am unable
to accept the Full Bench's conclusion at p.118.
I am of the opinion that the Director could not
have been said to have considered the appellant's
case on its merits since by the very acts of his
own officers he had deprived himself the
opportunity to consider a very vital factor of
the merits in the appellant's application to
remain. No illegal immigrant has any merit in
law to claim a right to remain in Hong Kong.
The only merit, if any, is on humanitarian
grounds. How could the Director be said to have
considered the merits if his officers failed to
allow the appellant to present his own case? They
40 also arrested the appellant thereby depriving
him the chance to gather material for that
purpose. For these reasons I am of the opinion
that the Director had not acted reasonably and
fairly towards the appellant. He issued the
removal order, in the circumstances, in breach
of the undertakings or assurances of the proper
authority. Such conclusion of mine should not
be misunderstood as criticism of the Director
or his officers or as any reflection of their
50 bona fides. In this regard I agree in full with
My Lord the Vice President's observations. I
appreciate only too well how hard pressed they
were at the material time in coping with a

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mammoth task.

The gravamen of the appellant's case then hinges on one point only and that is whether, as an alien, he is entitled to be treated with fairness. On this point, Mr. Bernacchi and Mr. Barlow agree that in exercise of an administrative discretion there are different degrees of fairness. Mr. Bernacchi asserts, however, that in the circumstances of the present case, at least the appellant has a right to be heard. He finds this right to be heard on two grounds. 10

- (a) The appellant had a legitimate expectation to remain in Hong Kong;
- (b) Alternatively, the Government undertook to consider his case on its merits thereby entailing an undertaking to hear him.

I do not feel that there is any substance on ground (a). The appellant is not only an alien but also an illegal immigrant who had been removed once from Hong Kong in 1976 and came back again illegally within a month. How can it be said that he sincerely expects that he has a right to remain in Hong Kong? All he has is, despite his lack of legal right, a hope that the Director might exercise his discretion in his (the appellant's) favour on humanitarian grounds. Mr. Bernacchi contends that the appellant has a right to be heard provided he had a legitimate expectation of some kind which need not be a legal right. Despite the grand tour of judicial approaches to this question through which Mr. Bernacchi has conducted us I do not find the cases he cites support his contention. In the case of Schmidt v. The Secretary of State for Home Affairs (1969) 2 Ch. D. 149, Lord Denning said at p.170 :- 20 30

"But in the case of aliens, it is rather different: for they have no right to be here except by licence of the Crown. And it has been held that the Home Secretary is not bound to hear representations on their behalf, even in the case of a deportation order, though, in practice he usually does so. It was so held in Rex v. Leman Street Police Station Inspector and Secretary of State for Home Affairs, Ex parte Venicoff /1920/ 3 K.B.72, which was followed by this court in Soblen's case /1963/ 2 Q.B. 243. Some of the judgments 40 50

10 in these cases were based on the fact
that the Home Secretary was exercising
an administrative power and not doing a
judicial act. But that distinction is
no longer valid. The speeches in Ridge v.
Baldwin [1964] A.C. 40 show that an
administrative body may, in a proper case,
be bound to give a person who is affected
by their decision an opportunity of
making representations. It all depends
on whether he has some right or interest,
or, I would add, some legitimate expecta-
tion, of which it would not be fair to
deprive him without hearing what he has to
say. Thus in In re H.K. (An Infant) [1967]
2 Q.B. 617 a Commonwealth citizen had a
right to be admitted to this country if he
was (as he claimed to be) under the age of
16. The immigration officers were not
20 satisfied that he was under 16 and refused
him admission. Lord Parker C.J., at p.630,
held that, even if they were acting in an
administrative capacity, they were under a
duty to act fairly - and that meant that
they should give the immigrant an opportuni-
ty of satisfying them that he was under
16."

30 It is abundantly clear that what Lord
Denning meant was legitimate expectation of
some legal right.

40 As to the other cases it was held that an
alien had the right to be heard only because
the alien would have a right of entry or to
remain in the host country without invoking any
discretion to be exercised by the proper
authorities provided that he (the alien) could
satisfy the authority that he possess certain
qualifications. This is made clear in the case
of In re H.K. (An Infant). The decision in
Salemi v. Minister for Immigration and Ethnic
Affairs (1977) 14 A.L.R.1 is founded on
interpretation of Australian Statutes. Without
going into the intricate reasons of the various
judgments the majority decision appears to be
that even if an applicant could prove his
qualification he still had no right to be heard.
If there is any conflict between this Australian
case with the English authorities. I will
50 follow the clear cut principle of the English
authorities. For this reason I am of the
opinion that the appellant had no right to be
heard unless he has a legitimate expectation of
some legal right of which the appellant had
none.

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The only point to be considered is the second proposition namely, the Government's undertakings. There is no doubt that the announcement at Government House assured the appellant and his fellow illegal immigrants from Macau that they would not be arrested pending an interview and that their cases were to be considered on their merits. This, in my opinion, entails an opportunity to be heard. The Director was in breach of both undertakings. The question is, does such assurance bind the Director. I am of the opinion that it does. The passage of de Smith's Judicial Review of Administrative Action at p.104 reads :-

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" The General principle remains that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Exceptions that are inspired by a desire to ensure that public bodies act "fairly" should be made with circumspection,"

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When cited in isolation this passage does not give the full picture. At p.103 of the same work the author wrote :-

"However, there is a growing body of authority, attributable in large part to the efforts of Lord Denning, to the effect that in some circumstances when public bodies and officers, in their dealings with a citizen, take it upon themselves to assume authority on a matter concerning him, the citizen is entitled to rely on their having the authority that they have asserted if he cannot reasonably be expected to know the limits of that authority; and he should not be required to suffer for his reliance if they lack the necessary authority. But it is extremely difficult to define with any degree of precision the circumstances in which the courts will be prepared, in the interest of "fairness" to the individual, to derogate from orthodox notions of ultra vires. First, public authorities have been held bound by assurances given in disregard of formal or procedural statutory requirements, upon which individuals have relied to their detriment. This principle was applied to a determination by a planning official upon whom the power to decide had not been delegated in proper form. The further suggestion that the authority would be

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similarly bound if it had no power at all to delegate is probably wrong."

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This is supported by Lord Denning's Judgment in the case of Regina v. Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association 1972 2 Q.B. 299. At page 308 Lord Denning said :-

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(continued)

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"It is said that a corporation cannot contract itself out of its statutory duties. In Birkdale District Electric Supply Co.Ltd. v. Southport Corporation [1926] A.C. 355 Lord Birkenhead said, at p.364, that it was

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" a well established principle of law, that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties. But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it. And I should have thought that this undertaking was so compatible."

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In another case in Lever Finance Ltd. v. Westminster (City) London Borough Council (1971) 1 Q.B. 222, Lord Denning said at p.230 :-

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"If the planning officer tells the developer that a proposed variation is not material, and the developer acts on it, then the planning authority cannot go back on it. I know that there are authorities which say that a public authority cannot be estopped by any representations made by its officers. It cannot be estopped from doing its public duty: see, for instance, the recent decision of the Divisional Court in Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd. [1962] 1 Q.B. 416. But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer, acting within the scope of

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his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be. A good instance is the recent decision of this court in Wells v. Minister of Housing and Local Government [1967] 1 W.L.R. 1000. It was proved in that case that it was the practice of planning authorities, acting through their officers, to tell applicants whether or not planning permission was necessary. A letter was written by the council engineer telling the applicants that no permission was necessary. The applicants acted on it. It was held that the planning authority could not go back on it."

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Applying such principles to the instant appeal it appears that the announcement at Government House was an assurance made after serious consideration and not erroneously. It cannot be said that the Director's discretion to be exercised by virtue of the provisions in the Immigration Ordinance would be fettered in any way by honouring such assurance. It was a procedural matter which was within the power of the proper authority to prescribe and it did so prescribe. It gave the appellant the assurance that his case would be considered on its merits and that he would not be arrested pending interview. The Full Bench had found that both such assurances had been broken. On this question of law I am of the opinion that such an undertaking would be binding upon the Director and such assurances gave the appellant an expectation that he would be heard. Even if the appellant, as an alien, had no right to be heard such an assurance granted him that right. An alien must have certain basic rights e.g. a right to rely on the assurance of his host country. In order to honour his assurance or undertaking the Director will not be hindered in the performance of his public duty under the Immigration Ordinance. The circumstances of the present case are very similar to the circumstances of the case of Liverpool Corporation and Lever Finance Ltd.

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What then is the end result of this? It means that the removal order was made in breach of an undertaking without granting the appellant an opportunity to be heard. In this way the Director's decision may be reviewed as being unreasonable and therefore unfair. It is not necessary to go into the merits of the argument

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whether by virtue the binding force of the assurance the arrest of the appellant was illegal. The assurance was not given erroneously. It does not prevent the Director acting in accordance with his statutory duty. This assurance had been broken. The Director in such a way, although acted in good faith, was unreasonable. As such, his decision in issuing the removal order was invalid. The only justification for the appellant's arrest was founded on the validity of the removal order. Once the removal order and the arrest were in breach of an undertaking and are invalid there is no further ground for the detention of the appellant. For these reasons I am of the opinion that the appellant succeeds. The writ of habeas corpus should issue in as much as orders of certiorari and prohibition.

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(continued)

As to the question whether this Court should be barred by its own previous decision, I am in full agreement with My Lord the Vice-President.

(Simon F.S. Li)
Justice of Appeal

Baber, J.:

Baber, J.

I agree with the Vice-President and Li, J.A. that the appellant is somewhat more deserving of a remedy than the Full Bench considered him to be. I agree with the Vice-President that the appeal should be allowed to the extent only that an order of prohibition should issue restraining the Director of Immigration from executing the removal order that he made against the appellant on 31st October 1980 until the appellant has had the opportunity of making within a reasonable time (a week or two should suffice) representations to the Director as to the circumstances of his case. Once this opportunity has been given it will be for the Director to decide the fate of the appellant upon the material then before him. It is not a matter upon which this Court expresses any opinion one way or the other. It is not our business to do so.

The appellant was led reasonably to believe that the case of each illegal immigrant from Macau would be decided on its merits. He was not given an adequate opportunity to state what he considered to be the merits of his case. An

by the Court on the 13th day of May 1981, the Respondent undertaking to comply with the provisions of the Rules and Instructions concerning Appeals to Her Majesty the Queen in her Privy Council.

In the Court of Appeal

No.13
Notice of Motion for leave to appeal to Privy Council by Respondent

Dated the 20th day of May, 1981.

20th May 1981
(continued)

To Kwan & Kwan
Solicitors for the Appellant
99 Des Voeux Road, C.,
H.K. Ind. & Comm. Bank Building,
18th floor,
Hong Kong.

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Signed

(Barrie Barlow)
Counsel for the Respondent

Estimate time: not exceeding 15 minutes.

No. 14

NOTICE OF APPEAL
BY APPELLANT

No.14
Notice of Appeal by Appellant
26th May 1981

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M/LA 1772/80 (NMGS)
IN THE COURT OF APPEAL
CIVIL APPEAL NO.188 OF 1980
(On Appeal from High Court Full Bench,
Miscellaneous Proceedings No.1019
of 1980)

BETWEEN

NG YUEN SHIU also known
as NG KAM SHING Appellant

- and -

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THE ATTORNEY GENERAL Respondent

TAKE NOTICE that the Court of Appeal will be moved on Tuesday, the 2nd day of June, 1981 at 10:00 o'clock in the forenoon or so soon thereafter as Counsel for the Appellant can be heard for an order giving leave to appeal against the decision of the Court of Appeal

In the Court
of Appeal

No.14
Notice of
Appeal by
Appellant
26th May 1981
(continued)

given herein to the Judicial Committee of the Privy Council, in so far as the Court of Appeal dismissed all that part of the appeal as was affected by the Court of Appeal's previous decision in Attorney General v. Cheung Kam Ping, Civil Appeal No.58 of 1980 AND INSOFAR AS the Court of Appeal declined to re-issue the writ of habeas corpus and to make any order(s) of certiorari in the circumstances of this case AND INSOFAR AS the Court of Appeal adjudged that the Appellant (Plaintiff) would not have had a right to be heard were it not for the undertaking from the Hong Kong Government that each case would be treated on its merits PURSUANT to the order in Council Regulating Appeals from The Court of Appeal For Hong Kong To Her Majesty in Council AND for appropriate directions under Rule 5 hereof.

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AND FURTHER TAKE NOTICE that it is the intention of the Appellant for this Notice of Motion to be heard with the Attorney General's Notice of Motion in regard to those parts of the judgments of the Court of Appeal which allows the Appellant's appeal.

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Dated the 26th day of May, 1981.

Sd. Brook Bernacchi, QC
Leading Counsel for the
Appellant.

Sd. Sammy K.C.Lee
Junior Counsel for the
Appellant

30

Sd: Kwan & Kwan
Kwan & Kwan
Solicitors for the Appellant

No. 15

In the Court
of Appeal

ORDER OF THE COURT OF
APPEAL GRANTING CONDITIONAL
LEAVE TO BOTH PARTIES TO
APPEAL TO HER MAJESTY IN
COUNCIL

No.15
Order of the
Court of
Appeal granting
conditional
leave to both
parties to
appeal to Her
Majesty in
Council

2nd June 1981

IN THE COURT OF APPEAL
CIVIL APPEAL NO. 188 OF 1980

(On Appeal from High Court Full Bench
Miscellaneous Proceedings No.1019 of
1980)

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BETWEEN:

NG YUEN SHIU also known Appellants
as Ng Kam Shing (Applicant)

N.J.Barnett
Registrar
9 SEP 1981

- and -

THE ATTORNEY GENERAL Respondent
 (Respondent)

BEFORE THE HONOURABLE SIR ALAN HUGGINS, VICE-
PRESIDENT, THE HONOURABLE MR. JUSTICE LEONARD
AND THE HONOURABLE MR. JUSTICE CONS

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O R D E R

UPON READING the notice of motion dated
the 26th day of May, 1981 filed on behalf of the
above-named NG Yuen Shiu also known as NG Kam
Shing

AND UPON READING the notice of motion dated
the 20th day of May, 1981 filed on behalf of the
Attorney General

AND UPON HEARING Counsel for NG Yuen Shiu
also known as NG Kam Shing and Counsel for the
Attorney General

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IT IS ORDERED that both NG Yuen Shiu also
known as NG Kam Shing and the Attorney General
do have leave to appeal to Her Majesty in
Council from the judgment of the Court of Appeal
dated the 13th day of May, 1981 on condition
that the Record be prepared and dispatched to
England with four (4) months from the date
hereof

40

AND IT IS FURTHER ORDERED that the questions

In the Court
of Appeal

No.15
Order of the
Court of
Appeal grant-
ing conditional
leave to both
parties to
appeal to Her
Majesty in
Council

2nd June 1981
(continued)

to be submitted to Her Majesty in Council
for decision be drawn up

AND IT IS FURTHER ORDERED that the
Attorney General's appeal be consolidated
with NG Yuen Shiu also known as NG Kam Shing's
appeal and that the Attorney General be the
Appellant

AND IT IS FURTHER ORDERED that both NG
Yuen Shiu also known as NG Kam Shing and the
Attorney General do have liberty to apply 10

AND IT IS FURTHER ORDERED that the costs
of the application of NG Yuen Shiu also known
as NG Kam Shing and the costs of the applica-
tion of the Attorney General be taxed in
accordance with the Legal Aid Regulations.

Dated the 2nd day of June, 1981.

N.J. Barnett
Registrar

No.16
Order of the
Court of
Appeal grant-
ing final
leave to both
parties to
appeal to Her
Majesty in
Council

2nd December
1981

No. 16

ORDER OF THE COURT OF
APPEAL GRANTING FINAL
LEAVE TO BOTH PARTIES
TO APPEAL TO HER MAJESTY
IN COUNCIL

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IN THE COURT OF APPEAL

CIVIL APPEAL NO. 188 OF 1980

(On Appeal from High Court Full Bench
Miscellaneous Proceedings No.1019 of
1980)

BETWEEN:

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NG YUEN SHIU also known as Ng Kam Shing Appellant
(Applicant)

- and -

THE ATTORNEY GENERAL Respondent
(Respondent)

BEFORE THE HONOURABLE MR. JUSTICE YANG,
JUSTICE OF APPEAL AND THE HONOURABLE MR. JUSTICE
BARKER, JUSTICE OF APPEAL, IN COURT

O R D E R

UPON hearing Crown Counsel for the Attorney General and Counsel for Ng Yuen Shiu also known as Ng Kam Shing, IT IS ORDERED that both parties do have final leave to appeal to Her Majesty in Privy Council from the judgment of the Court of Appeal dated the 13th day of May, 1981.

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AND IT IS FURTHER ORDERED that the costs of this application be costs in the Appeal

Dated the 2nd day of December, 1981.

L.S.

N.J. Barnett
Registrar

In the Court
of Appeal

No.16
Order of the
Court of
Appeal grant-
ing final
leave to both
parties to
appeal to Her
Majesty in
Council

2nd December
1981

(continued)

EXHIBITS

A1

Affirmation of
Kwan Lim Ho

6th November
1980

EXHIBITS

A1

AFFIRMATION OF KWAN LIM HO

No.1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT
MISCELLANEOUS PROCEEDINGS

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

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IN THE MATTER of an Application
for a Writ of Habeas Corpus and
Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING

Applicant

- and -

ATTORNEY GENERAL

Respondent

AFFIRMATION OF KWAN LIM HO

I, Kwan Lim Ho of 18, Bonham Road, Victoria,
Hong Kong, Solicitor, do solemnly sincerely and
truly affirm and say as follows :-

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1. I am the solicitor in charge of this case
and the facts deposed hereto are within my
knowledge.

2. The Applicant instructed my firm to apply
to stay in Hong Kong in an appeal pursuant to
Sections 19(1)(b), 19(5)(b) and 53(A) of the
Immigration Ordinance. A copy of the said appeal
is now produced and shown to me marked "A".

30

3. On the 5th November 1980 at 4:50 p.m., I
have been informed by a Mr. Shum of the Immigra-
tion Department that the appeal had been dismissed
and the Applicant is liable to be repatriated
at any moment.

4. The Applicant is now in custody at Victoria
Remand Centre and is unable to make any
affirmation.

5. I am given to understand that the Applicant is a Chinese, and had been in Hong Kong for a continuous period of 7 years as an ordinary resident and I verily believe that the Applicant has a right to land in Hong Kong and to stay in Hong Kong

EXHIBITS

A1

Affirmation of
Kwan Lim Ho
6th November
1980

(continued)

AFFIRMED at Office of Messrs)
Leonard K.L.Heung & Co.,
Solicitors Hong Kong this
5th day of November 1980

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Before me,
Sd: K.L.Heung
Solicitor, Hong Kong

No.1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT
MISCELLANEOUS PROCEEDINGS

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

20

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus and
Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

The exhibits herein are referred to in the
Affirmation of Kwan Lim Ho filed herein on the
6th day of November, 1980

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<u>EXHIBIT MARKED</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>NO. OF SHEET</u>
A	31/10/80	Notice of Appeal Against Removal Order	6

Kwan & Kwan
Solicitors,
Hong Kong

EXHIBITS

A1

Affirmation of Kwan Lim Ho 6th November 1980 (continued)

IMMIGRATION ORDINANCE 入境條例

(Chapter 115) (香港法例第一一五章)

Sections 19(1)(b), 19(5)(b) and 53(A)

第十九條第(1)款(b)段
第十九條第(5)款(b)段
第五十三A條

NOTICE OF APPEAL AGAINST REMOVAL ORDER

上訴反對遣送離境令通知書

I NG YUEN SHIU (吳遠紹) also known as NG KAM SHING (吳金城) wish to appeal against the removal order, notice of which was served on me at noon on 31st October, 1980 on the following grounds: (NB: The grounds of appeal and the facts upon which you wish to rely must be fully stated here).

(注意: 上訴理由及事實根據, 必須詳細列明)

(See attached sheets)

This is the exhibit marked "A" referred to the Affidavit/Affirmation of KWAN LIM HO dated this 5th day of November 1980. Before me,

[Signature]
Solicitor,
Hong Kong

Signed Kwan & Kwan, Solicitors for NG YUEN SHIU also known as NG KAM SHING
Date ... 31st October, 1980 ...
日期:
Time:
時間:

1. I am born on 16th May, 1951 in China.

EXHIBITS

A1

2. My parents brought me along when I was 3 years old to Macau; wherefore I started my education in 1955 in Macau. I have attended the following schools :-

Affirmation of
Kwan Lim Ho

6th November
1980

(continued)

- a. Vegetable farmers' Children's School
- b. Macau Workers' Children's School
- c. Macau Ho Kong Secondary School

I left school in 1965.

10 3. When I finished my schooling in Macau; I started to work as an apprentice in repairing sewing machines, and the place of work was in Macau. My employer/Master of trade was called Mr. Wong So Lam. Macau first faced the Chinese Cultural revolution in 1966 and the business of Mr. Wong So Lam has to close down, and Mr. Wong came back to Hong Kong to start his business in Fuk Wing Street, Shamshuipo, Kowloon.

20 4. I then took the chance in early 1967 and came to Hong Kong and continued to complete my apprenticeship.

5. I first stayed with my uncle Ng Ming (now deceased) in Block 3, Lam Tin Estate, Kowloon.

6. I became a skilled technician in 1968 and started my work in various garment factories. I remembered I have been working with Rainbow Garment Factory of Ng Fong Street, San Po Kong, Kowloon and Sun Hing Garment Factory at To Kwa Wan.

30 7. Since I was an illegal immigrant in the early seventies, I could not register my name with any well established factories, but instead I have to use my colleagues' name or friend's name. Despite the aforesaid fact, I managed to render my skilled service to various garment factories and I was able to look after up to 800 sewing machines in a factory. My income was in the average of HK\$2,000.00 in the beginning, but becoming more up to HK\$5,000.00 in 1975 and
40 1976.

8. I constantly remitted my income to Macau and I looked after my parents and younger brothers.

My parents are Ng Chiu Bo, father, 69 retired

EXHIBITS

Ng Yu Sheung Hang, Mother, 68, retired

A1
Affirmation of
Kwan Lim Ho
6th November
1980
(continued)

Younger brothers are: Ng Min Chung aged 25;
Ng Chi Hung aged 24;
Ng Hoi Ping aged 17

I was the eldest son of the family, my old aged parents have to depend on my earning very much. I used to instruct goldsmith shop Chow Sang Sang to remit the money to Macau.

9. In 1976, because the factory employers asked me to show them my Identity Card, and since I was unable to do so, I decided to apply for an Identity Card in 1976 March. The Matter was brought up to the Immigration Department for investigation and subsequently I was deported to Macau. 10

10. I came to Hong Kong again in April, 1976, once again as an illegal immigrant and took up a job with Pui Yee Garment Factory. Because I do not have any Identity Card, my salary was comparatively lesser than my fellow colleagues. Nevertheless, I saved up some money in 1976-1977 and by the end of 1978, I was able to raise a capital of HK\$40,000.00. 20

11. I understand it is an endless oppression from the factory if I continued to work as an employee but without any Identity Card. I therefore started to run my business with Mr. Kwong Chi Pang as the registered sole proprietor.

The business was run under the name of KAM SHING GARMENT FACTORY, Business Registration Certificate No.5845-859-000-10-8 at No.74, Oak Street, 8th Floor, Tai Kok Tsui, Kowloon. 30

12. The Business had 15 sewing machines, with 10-20 workers, and the profit ranges from HK\$15,000.00 to HK\$20,000.00 a month. I was responsible for obtaining orders from various exporters in Hong Kong and repairing machines and Mr. Kwong was responsible for the production.

13. My firm is specialized in manufacturing fashion garment, mostly for export to U.S.A. and European Countries. 40

14. I have never been charged by any government Department/authorities in Hong Kong or in Macau, and certainly no criminal record in any courts.

15. Because I do not have an Identity Card, I could not marry in Hong Kong.

16. I believe if I am deported back to Macau, I understand my business shall come to an end, my employees shall be jobless and I shall not be able to participate in the garment industry in Hong Kong any longer.

EXHIBITS

A1

Affirmation of
Kwan Lim Ho

6th November
1980

(continued)

17. I also believe that the Hong Kong Government has in the past allowing illegal immigrants coming from Macau to stay in Hong Kong and I humbly pray that the Immigration Tribunal shall allow my stay in this Community.

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EXHIBITS

A2

AFFIRMATION OF NG YUEN SHIU

A2

Affirmation of
Ng Yuen Shiu

18th November
1980

No. 1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

IN THE MATTER of NG YUEN
SHIU also known as NG KAM
SHING

- and -

IN THE MATTER of an
Application for a Writ of
Habeas Corpus and
Subjiciendum

20

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

AFFIRMATION OF NG YUEN SHIU

I, Ng Yuen Shiu, alias Ng Kam Shing alias Ng Man Siu of No.74, Oak Street, 8th Floor, Taikoktsuai, Kowloon, do solmenly sincerely and truly affirm and say as follows :-

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EXHIBITS

A2

Affirmation of
Ng Yuen Shiu

18th November
1980

(continued)

1. I am the Applicant herein now under remand at the Victoria Remand Centre, Old Bailey Street, Central, Hong Kong.

2. I have been detained at the aforesaid Remand Centre since 29th October 1980 and the circumstances leading to my detention and purported Removal Order issued by the Director of Immigration are set out in the paragraphs that follow.

3. On the 23rd October 1980, the Hong Kong Government passed a new Law requiring all citizens to carry identity card and prohibiting employment of illegal immigrants. The Government then granted an amnesty to all illegal immigrants coming from China until 12:00 mid-night on the 26th October, 1980. Around the 24th October, 1980 to 27th October 1980, I read from Sing Pao Newspaper that the Government was also appealing to all illegal immigrants to register with the Immigration Department and the Government would consider each case individually and sympathetically.

10

20

4. In consequence early in the morning on the 28th October 1980, I went to the Immigration Department at Li Po Chun Chambers and informed an officer at the counter that I came from Macau and I wished to obtain an identity card. I was given a map also a card giving an appointed time and date, it read "29th October 1980, A.M."

5. On the same evening, I watched TVB news and an appeal was made by one Lam Yau Kong, an assistant Immigration Director inviting all illegal immigrants from Macau to come forward and register themselves and he further stated that no arrest would be made during the course of investigation. This decided me definitely to attend as I have been directed, and removed any lurking fear that my case would not be fully investigated.

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6. On the 29th October 1980, I went to "CC" Block at Cotton Tree Drive near Queensway as directed, together with the provisional identity paper issued in 1975, two Hong Kong bank books, and a removal order made in 1976 against me. I was among one of the very first batch that obeyed the appeal by the Government through the newspapers and television news and went to register myself with the Immigration Department.

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7. I waited there for almost an hour, but at about 10:30 a.m., I was told to approach the

EXHIBITS

A2

Affirmation of
Ng Yuen Shiu

18th November
1980

(continued)

counter and an immigration officer attended to me. He asked about my name, my age and asked me to show any identification documents that I had brought with me. The officer then took away my provisional identity paper issued in 1975 and the removal order made in 1976 after a short while, I was told to go down to the ground floor. I was never asked details about my background nor I was given any chance to present my case. I waited in a room until early in the afternoon when I was told to board a van together with some other people. To my surprise, the van took us to Victoria Remand Centre and then I realized that I have been detained and arrested.

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8. On the same afternoon inside Victoria Remand Centre, I was interviewed by an immigration officer who then asked me for my name, the route that I took to come back to Hong Kong, my occupation and if I had any relatives in Hong Kong. I asked him why I was arrested or detained and what would be the steps that they will take against me but he did not reply. I was not informed the purpose of this interview nor did he allow me to say anything other than answering his specific questions.

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9. After the interview, at about 5:00 p.m. on the same day, I was given permission to ring up a clerk in a solicitor's firm. On the next day, Mr. L.H.Kwan, Solicitor, and his clerk Mr. Leung came to visit me at about 3:00 p.m.

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10. On the 31st October 1980 at about 12:00 noon, I was served with a Notice of Removal Order and a copy is now annexed hereto marked "NYS-1". At about 2:15 p.m., I rang up my solicitor Mr. L.H.Kwan and I gave instructions to my solicitor to appeal against this decision as appeared in my Notice of Removal Order.

11. As stated in the Removal Order, I was only given 24 hours to prepare a written notice of my grounds of appeal and I could only give my instructions to my solicitor briefly and he then lodged a written notice of appeal on my behalf a copy whereof has been exhibited in Mr. L.H.Kwan's affirmation dated the 5th November 1980 and marked "A". However I am informed by my legal advisers and verily believe that the jurisdiction of the Appeals Tribunal is very limited and no help to me.

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12. On the 5th November 1980 in the afternoon I was informed by an officer of the Immigration

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EXHIBITS

A2

Affirmation of
Ng Yuen Shiu

18th November
1980

(continued)

Department that my appeal has been dismissed. Thereafter I received a written Notice of Dismissal of an Appeal determined by the Tribunal under Section 53C and a copy of the same is now annexed hereto and marked "NYS-2".

13. On the 6th November 1980 my solicitor obtained a Habeas Corpus in the High Court on my behalf and I am allowed to stay until the 20th November 1980.

14. I first came to Hong Kong in 1967 and I stayed here until 1976 when I was removed back to Macau. I came to Hong Kong again in the same year I stayed setting up my own small factory until I was arrested on the 29th October 1980. I now employ 11 workmen. 10

15. I am informed and verily believe that the illegal immigrants who went up for registration at the Immigration Department at a later date were not detained pending investigation. I am informed by my legal advisers and verily believe that the Director of Immigration has a discretion whether or not to make a Removal Order under Section 19 of the Immigration Ordinance and therefore in exercising his power to arrive at a decision he ought to exercise his discretion fairly and judicially. Since I was never given any chance to make any representations, I verily believe that the Director of Immigration has never been aware of the whole background of my case including my links with Hong Kong during the past 13 years. My good conduct in Hong Kong and the fact that I now have my own business. In the circumstances I verily believe that the Director of Immigration has never considered my case individually before making the Removal Order, as he had promised when he made the appeal through the news media. 20 30

AND LASTLY I do solemnly sincerely and truly affirm and say that the contents of this my affirmation are true. 40

AFFIRMED at Victoria Remand Centre, Victoria, this 18th day of November, 1980, the same having been duly interpreted to the Affirmant in Cantonese dialect of the Chinese languages by :-) Sd: (In Chinese)

Sd: K.K.Fung Sworn Interpreter 50

Before me,
Sd:
Solicitor Hong Kong
A Commissioner for Oaths

EXHIBITS
A2
Affirmation of
Ng Yuen Shiu
18th November
1980
(continued)

No.1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

10 IN THE MATTER of NG YUEN
SHIU also known as NG KAM
SHING

- and -

IN THE MATTER of an
Application for a Writ of
Habeas Corpus and
Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

20 ATTORNEY GENERAL Respondent

The exhibit herein are referred to in the
Affirmation of Ng Yuen Shiu filed herein on the
18th day of November, 1980.

<u>EXHIBIT MARKED</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>NO. OF SHEET</u>
NYS-1	31/10/80	Removal Order	2

Kwan & Kwan
Solicitors,
Hong Kong

This is the exhibit marked 'N/3-
referred to the Affidavit/Alliance
of Ng Yuen-siu
this 18th day of Nov.

IMMIGRATION ORDINANCE
入境條例
(Chapter 115)
(香港法例第一一五章)
Section 19(5)
第十九條第(5)款

Before me.
Sheldon Hui King
Commissioner for Oaths

Notice of Removal Order and Right of Appeal
遣送離境令及上訴權利通知書

To: Mr. ~~Ng Yuen-siu~~
致: 吳建紹 先生/女士

TAKE NOTICE that pursuant to section 19(1)(b)(ii) of the Immigration Ordinance the Director/Deputy Director of Immigration has on the 31st day of 1980 made a removal order against you on the grounds that you have committed an offence under
茲請注意入境事務處處長/副處長已於一九八〇年十月三十一日按照入境條例第十九條第(1)款(b)段(ii)節之規定，向 台端發出遣送離境令，理由為 台端經已觸犯入境條例下列各條款：

- Section 38(1) (Prohibition of landing and remaining without permission)
第三十八條第(1)款 (禁止登陸入境及未經批准而在本港逗留)
- Section 41 (Breach of condition of stay)
第四十一條 (違反居留條件)

of the Immigration Ordinance. The Director/Deputy Director of Immigration has also authorised your detention in custody pending your removal from Hong Kong to Macao.
入境入境事務處處長/副處長並已授權將 台端拘留，俟將 台端遣離本港送往澳門。

TAKE FURTHER NOTICE that you may, if you wish, appeal to a Tribunal under Section 53A of the Immigration Ordinance against the decision to make the Removal Order. If you wish to appeal you must do so by giving to an immigration officer or an immigration assistant written notice of your grounds of appeal and the facts upon which you rely within twenty four hours of receiving this Notice (that is by 1200 hours on 1st November, 1980).
茲又請注意，根據入境條例第五十三A條之規定，台端可向審裁處提出上訴，反對 候發遣送離境令之決定。台端倘欲提出上訴，必須在接到本通知書二十四小時內(即在一九八〇年十一月一日中午十二時零分之前)向書面通知入境事務主任或入境事務助理員說明上訴理由及事實根據。

A form for your use in setting out your appeal is attached. An officer of the Prisons Department is available to assist you in writing out your appeal if you so wish.
現隨函附上上訴表格乙份。台端

Dated 31st October 1980
日期：一九八〇年十月三十一日

K.C. CHEUK
for Director of Immigration
入境事務處處長
(卓觀卿 代行)

I acknowledge receipt of the original copy of this Notice and an Appeal Form which have been explained to me in Puntis and which I understand.

EXHIBITS

A2
Affirmation of
Ng Yuen Shiu

18th November
1980

(continued)

Signed

Date: 31st October 1980

Time: 1200 hours

10

I have explained the contents of this Notice to the subject named overleaf and have given him/her the original copy which has been acknowledged above. I have also given him/her an Appeal Form for his/her use.

.....
Signature of Immigration
Officer

No.1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

20

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus
and Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

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The exhibit herein are referred to in the Affirmation of Ng Yuen Shiu filed herein on the 18th day of November, 1980.

<u>EXHIBITS</u>	<u>EXHIBIT MARKED</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>NO. OF SHEET</u>
A2 Affirmation of Ng Yuen Shiu 18th November 1980 (continued)	NYS-2	3/11/80	Notice Kwan & Kwan, Solicitors, Hong Kong.	1

This is the exhibit marked NYS-2 referred to the Affirmation of Ng Yuen Shiu this 18th day of November

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Before me,
Sd: Lawrence Lai
Solicitor, Hong Kong
Commissioner for Oaths

NOTICE OF DISMISSAL OF AN APPEAL
DETERMINED BY THE TRIBUNAL UNDER
SECTION 53C

Ref: IMM CR 5010/80 Immigration Appeals Office
Victoria Immigration
Centre

20

Date: 3rd November 1980

To: Mr. NG Yuen-siu
c/o Director of Immigration

APPEAL TO THE TRIBUNAL
IMMIGRATION ORDINANCE (CAP.115)

You have appealed to the Tribunal against the decision of the Director of Immigration to make a removal order against you on the grounds that :

(as contained in the statement of Facts and Grounds of Appeal attached to your Notice of Appeal Against Removal Order dated 1-11-1980)

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2. The Tribunal has examined your written notice of appeal and is satisfied that the facts or matters on which you are seeking to rely are not matters which would entitled you to succeed in the appeal, accordingly, the appeal has been dismissed without a hearing.

3. The Tribunal has directed that your Notice

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of Appeal and related papers be forwarded to the Secretary for Security, for his consideration of the other matters disclosed in the appeal papers.

EXHIBITS

A2
Affirmation of
Ng Yuen Shiu
18th November
1980
(continued)

Signed: T.F.Tsui
(TSUI Tim-fook)
Adjudicator

Signed: S.S.Tan
(S.S.TAN)
Adjudicator

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EXHIBITS

A3

AFFIRMATION OF NG YUEN SHIU

A3
Affirmation of
Ng Yuen Shiu
19th November
1980

No.1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus and
Subjiciendum

20

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

AFFIRMATION OF NG YUEN SHIU

I, Ng Yuen Shiu, alias Ng Kam Shing alias
Ng Man Siu of No.74, Oak Street, 8th floor,
Taikoktsui, Kowloon, do solemnly, sincerely
and truly affirm and says as follows :-

30

EXHIBITS

A3
Affirmation of
Ng Yuen Shiu
19th November
1980
(continued)

1. I wish to add to my early affirmation dated 18th November, 1980, that my business, in the name of KAM SHING GARMENT FACTORY, is registered with the Business Registry as Certificate No.5843-859-000-10-8. As I only started my business in 1978 I remember I have filed my tax return once only and at that time I have made a very small profit and therefore I remember I need not pay tax for the first year of my business. However, I have every intention to continue to file my tax return every year and be a law abiding citizen. I have a very small contribution to society so far but I have tried my very best and I shall make every effort to continue my factory if I am allowed to stay.

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AND LASTLY I do solemnly sincerely and truly affirm and say that the contents of this my affirmation are true.

AFFIRMED at Victoria Remand
Centre, Victoria, this
19th day of November 1980
the same having been duly
interpreted to the Affirm-
ant in Cantonese dialect
of the Chinese languages
by :-

20

(Sgd) (In Chinese)

Sd: K.K.Fung
Sworn Interpreter

Before me,

30

Sd:
A Commissioner for Oaths

A4
Copy extraction
from Shing Poa
and its certi-
fied translation

EXHIBITS

A 4

COPY EXTRACTION FROM
SHING POA AND ITS
CERTIFIED TRANSLATION

E X H I B I T P.1

Copy of Extraction from Shing Poa and its certified transaction put in by Applicant on the trial before the Full Bench

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(0.35.r.1D)

IN THE SUPREME COURT OF HONG KONG
MISCELLANEOUS PROCEEDINGS

Copy extraction
from Shing Poa
and its certi-
fied translation
(continued)

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant
- and -
THE ATTORNEY GENERAL Respondent

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LIST OF EXHIBITS

Tried on 20th day of November 1980 before
the Hon. Sir Denys Roberts, Chief Justice and
the Hon. Mr. Justice Rhind

Name of Judicial Clerk
PATRICK LAU

Number of Exhibit	Description of Exhibit	Party who put in Exhibit	Witness who proves Exhibit	Notes
20	P1 Copy of extraction from Shing Poa and translation	Applicant	P.W.1	

EXHIBITS

A4

Copy extraction
from Shing Poa
and its certi-
fied translation
(continued)

At about 5:15 p.m., Assistant Principle Immigration Officer LAM Yan-kwong, accompanied by the aide of the Governor, gave the petitioners an immediate reply, indicating that the said group of illegal immigrants could go to the office at Li Po Chun Chambers to obtain the forms today and to go to the office in Queensway to go through registration formalities on the date specified in the forms. Immigration officers would interview them individually and proceed with the enquiries of them. LAM said during the period in which enquiries of illegal immigrants were going on, it was assured that they would not be arrested or repatriated; as to whether they would be permitted to stay in Hong Kong or not, Lam Yan Kwong emphasized that it had to be decided case by case; individual circumstances could be made known to Immigration officers in the interview; but if an applicant had relatives or family in Hong Kong or if he had stayed illegally in Hong Kong for a long period of time, that would be helpful to his application for permission to stay in Hong Kong. At the same time, Mr. Bridge, Director of the Immigration Department also announced that registered illegal immigrants from places other than China (Mainland) could continue to work during enquiries of them.

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Lee Lun Thompson of the Judiciary, being a person appointed in writing by the Honourable the Chief Justice under section 27(2) of the Evidence Ordinance (Cap.8) hereby certify that the foregoing is a true translation of a Chinese document marked J808/82

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Dated 20 NOV 1980

Sd:

COURT TRANSLATOR

40

黃夢花規勸取銷通宵靜坐

黃夢花規勸取銷通宵靜坐

【本報訊】約四百名由港僑胞來港之市市民，自港來港後，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。

請願代表昨日向新聞界發表其向港府請願內容時，表示，港府此次給中大港民非法佔領一特許命令，使所有大港民及港民可以領取一特許命令，但此項命令，實有欠公允。請願代表指出：「由於港府對港民非法佔領，已令很多港民失業，且港民在港中，只是一個被奴役的奴才。」

港民在港中，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。

黃夢花說不是陷阱

【本報訊】黃夢花昨日在港中，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。

先往登記中午再往請願

【本報訊】黃夢花昨日在港中，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。

口頭提保證

【本報訊】黃夢花昨日在港中，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。

不會拿人

【本報訊】黃夢花昨日在港中，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。

港門前靜坐者

【本報訊】黃夢花昨日在港中，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。

第五示瘋狗

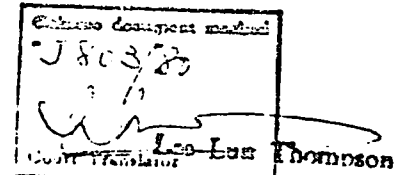
【本報訊】黃夢花昨日在港中，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。

狗主合家接受

【本報訊】黃夢花昨日在港中，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。

陰晴

【本報訊】黃夢花昨日在港中，曾向港府請願，要求港府先在大會堂對開的香港海濱及新加坡街，設法安插，俾港民有休息之處，但港府未予理會，港民仍未獲當局滿意之答覆。其後請願代表及各人先行散隊，並決定今日中午再向港府請願。



20 NOV 1930

EXHIBITS

R1

Affirmation of
Lam Yan Kwong

20th November
1980

EXHIBITS

R1

AFFIRMATION OF LAM YAN
KWONG

No. 1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

10

IN THE MATTER of an Application
for a Writ of Habeas Corpus
and Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

Affidavit of Lam Yan Kwong

I, Lam Yan Kwong of Hong Kong, Assistant
Principal Immigration Officer make oath and
say as follows :-

20

1. I am an Assistant Principal Immigration
Officer employed by the Hong Kong Government
Immigration Department. I work in Headquarters
and my duties include Public Relations.

2. I have read the affirmation of the
Applicant herein dated the 18th of November,
1980 and I believe that the person he refers
to in paragraph five therein as "Lam Yan Kwong,
an assistant Immigration Director" is myself.

30

3. The only television announcement made by
the Immigration Department during the period
from the 24th of October, 1980 until the 29th
of October, 1980 was an announcement expressly
and specifically directed at illegal immigrants

from China and this announcement was made over the Chinese and the English television channels. A copy of the text of that announcement is annexed and exhibited hereto and marked "L.Y.K.-1". No other announcement was made.

EXHIBITS

R1

Affirmation of
Lam Yan Kwong

20th November
1980

(continued)

10 4. I have read the affirmation of the applicant dated the 18th of November, 1980. The allegations contained in paragraph five thereof are incorrect. I never appeared on television on the 28th of October or any other date. I did not make any appeal to all illegal immigrants from Macau to register and no Immigration Department announcement to that effect was made.

20 5. However, on the evening of the 28th of October, 1980 a number of people petitioned the Governor at Government House seeking assurances regarding illegal immigrants from Macau. They sought answers to three questions. I went to Government House that evening and verbally gave to the Petitioners answers to those three questions on behalf of the Department. Annexed and exhibited hereto and marked "L.Y.K.-2" is a written copy of the said questions and answers. It may be that the Press and the television news reporters reported this incident. If so I do not know of the terms in which it was reported or whether it was reported accurately but I do know that no announcement regarding Macauese
30 illegal immigrants was made by the Immigration Department on the 28th of October, 1980. On the 29th of October, 1980 the Immigration Department received various queries from the press regarding the possibility of an amnesty for illegal immigrants who did not come to Hong Kong from China. A press release was issued stating that no amnesty would be given to such illegal immigrants.

40 6. Annexed and exhibited hereto and marked "L.Y.K.-3" is a copy of the Immigration Service Temporary Order No.8/80 which outlined the procedure for the initial registration of illegal immigrants during the "grace period" (that is, the 24th of October, 1980 to the 27th of October, 1980).

SWORN at Courts of Justice)
Victoria, Hong Kong, this) Sd. Y. Lam
20th day of November, 1980)

50 Before me,
Sd: A.Ming
Antony NG Ming, Senior Judicial Clerk
SUPREME COURT,
A Commissioner for Oaths
a Commissioner for Oaths JUDICIARY

EXHIBITS

No. 1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

R1
Affirmation of
Lam Yan Kwong
20th November
1980
(continued)

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus
and Subjiciendum

BETWEEN:

10

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

LIST OF EXHIBIT REFERRED
TO IN THE AFFIDAVIT OF
LAM YAN KWONG

Filed herein on the day of 1980

<u>Exhibit Marked</u>	<u>Description</u>	<u>Date</u>	<u>No. of Sheets</u>	
"L.Y.K.-1"	Television Announcement		3	20

ATTORNEY GENERAL'S
CHAMBERS
HONG KONG

Registration of IIs

EXHIBITS

Television Announcement

R1

Affirmation of
Lam Yan Kwong
20th November
1980

This important announcement is directed at all immigrants from China who entered Hong Kong illegally.

(continued)

10 A new law has been passed which means all illegal immigrants from China who do not already have an identity card, or who have not applied for registration, must now do so --- immediately.

This is your last chance. If you do not register for an identity card before midnight on Sunday, October 26 you are liable to be repatriated to China.

The place to register is the special registration centre in Victoria Barracks on Hong Kong Island. The entrance to the centre is in Cotton Tree Drive.

20 Special arrangements have been made to keep the centre open day and night until midnight on Sunday. If you are an illegal immigrant who does not have an identity card you must go to the centre and register immediately. And, you should take with you three recent passport photographs of yourself.

It is important that you realise this is your last chance. You have until midnight on Sunday. So register now!

30 This is the exhibit marked L.Y.K.-1 referred to in the affidavit of Lam Yan Kwong sworn before me this 20th day of November 1980

Sd:
Commissioner for Oaths
Antony NG Ming,
Senior Judicial Clerk
SUPREME COURT

EXHIBITS

R1

Affirmation of
Lam Yan Kwong
20th November
1980
(continued)

非法入境人士登記領取身份證
 (重覆及廣播同)

所有由中國非法進入香港既人士^如進出
 家宣傳噱頭，對內地非行緊要，請各位留心聽
 住。

政府已經訂立新法例，所有由中國非法進
 入香港既人士，如要來搵到香港身份證
 未嘗申請自然認既，一定需要即刻登記
 呢個係你地呢晚最後機會，如果喺十月六
 日^即為星期日半夜之前仲未登記，你就會
 審去中國^好

登記領取身份證既地方，^如香港^或澳門^或英屬
 既特別登記中心，入既地^如在打拉

EXHIBITS

R1

Affirmation of
Lam Yan Kwong
20th November
1980

(continued)

特別登記中心今日夜辦公，直至星期
 半夜為止。如果你非法入境人士而仲未有身
 份証，你就立即登記，你一定帶埋三張
 四吋半照片。
 你地知道，呢個係你地最後機會，到
 星期半夜截止。你宜家就即刻去登記嘞！

（電視原聲帶）

EXHIBITS

No. 1019 of 1980

R1

Affirmation of
Lam Yan Kwong

20th November
1980

(continued)

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus and
Subjiciendum

BETWEEN:

10

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

List of Exhibit referred to
in the Affidavit of
LAM YAN KWONG

Filed herein on the day of November, 1980

<u>Exhibit</u> <u>Marked</u>	<u>Date</u>	<u>Description</u>	<u>No. of Sheets</u>	<u>20</u>
L.Y.K.-2		Questions and Answers	1	

ATTORNEY GENERAL'S CHAMBERS
HONG KONG

- Q: Should we report to Victoria Barracks?
A: No. You should go to Li Po Chun Chambers
individually from 9 o'clock tomorrow
morning as have over 2,500 people today.
Q: Will we be arrested?
A: No. Not during these interviews.
Q: Will we be given identity cards?

30

A: Those IIs from Macau will be treated in accordance with procedures for IIs from anywhere other than China. They will be interviewed in due course. No guarantee can be given that you may not subsequently be removed. Each case will be treated on its merits.

EXHIBITS

RI

Affirmation of
Lam Yan Kwong
20th November
1980

(continued)

10

This is the exhibit marked "LYK-2" referred to in the affidavit of Lam Yan Kwong sworn before me this 20th day of November 1980

Sd:

Antony NG Ming
Senior Judicial Clerk
SUPREME COURT
Commissioner for Oaths

No. 1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

20

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus
and Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

30

List of Exhibit referred to
in the Affidavit of
Lam Yan Kwong

Filed herein this day of 1980

App.C

3. The initial registration procedure (see Appendix C) involves no investigation of the applicant. That will come later, at the normal registration stage.

EXHIBITS

R1

Affirmation of
Lam Yan Kwong

20th November
1980

(continued)

10

4. Publicity will stress that normal immigration and registration services at Victoria Barracks will be suspended during the grace period, and that only illegal immigrants from China who have not previously registered should report to Victoria Barracks during this time. Any members of the public who present themselves at Victoria Barracks seeking normal services should be advised to return to the appropriate office on or after Tuesday 28 October. Counter officers who have doubts about an applicant should refer to a supervisor before completing the initial registration procedure.

Photographs

20

5. Publicity will stress the need for applicants to bring with them 3 passport photographs. Applicants with unacceptable photographs or with no photographs, will not be admitted to the offices, but will be directed to the ground floor of either block HH or block I, where an official service will be available. Because of limited capacity, this facility is NOT to be advertised.

Staff

30

6. Up to 72 counters will be manned during each shift, depending on demand. DD(SD) will be in overall command of the operation, assisted by an AD on roster. Each shift will be commanded by an APIO, assisted by 1 CIO in charge of initial registration and 1 CIO in charge of field operations. Each of the 5 registration offices (Block HH, Ground, 1st and 2nd floors, Block G, 1st floor and Block I 1st floor) will be under the supervision of an SIO. Duty rosters are being issued separately.

40

Command post

7. The command post for the operation is located in the basement of Block HH. A telephone directory is at Appendix D.

AppD

Access to Victoria Barracks

8. The normal queuing arrangements will NOT apply for the grace period. Access for the public will be via Cotton Tree Drive only. Queues will be under police control and will be

EXHIBITS

R1

Affirmation of
Lam Yan Kwong

20th November
1980

(continued)

channelled in small groups to Blocks G and I or HH. Relatives will be discouraged from joining the queues by means of publicity but the police will not attempt to keep them out. Admission to Blocks HH, G and I will be controlled by immigration service officers who will ask relatives to remain outside, except those accompanying children or in special cases involving elderly or sick persons, where it would be unreasonable to keep the relatives out.

10

9. Staff on duty in Block HH will use the Queens Road East gate, whilst staff on duty in Blocks G and I should use the entrance to Block I.

App.B

10. A sketch plan for these arrangements is at Appendix B.

Identification

11. Immigration service staff will wear uniform whilst on duty and be required to show their warrant cards to gain admission to Victoria Barracks. Immigration service staff without uniform will display their warrant cards whilst on duty.

20

12. General grades staff will be required to show their ID Card together with a special identification permit issued by the Departmental Secretary, to gain admission to Victoria Barracks. The identification permit is to be displayed whilst on duty.

30

Meal breaks and refreshments

13. Light refreshments, such as tea and biscuits will be provided. Staff may wish to bring in their own food to avoid congestion which may occur in the area. Meal times will be staggered to give all staff a reasonable break during their shift.

Enquiries

14. Requests for information and statistics from reports should be referred to GIS.

40

15. Staff on duty at Victoria Barracks are authorised to answer enquiries from the public on matters of procedure covered in this Order. Otherwise enquirers should be advised to telephone Immigration Enquiries (5-434711), between 8 am and 9 pm (including Saturday and

Sunday 25 and 26 October).

EXHIBITS

R1

Briefing

16. Briefing sessions at HQ are being arranged for SIOs and above. SIOs will be responsible for briefing both immigration service and general grades officers under their command, at Victoria Barracks.

Affirmation of
Lam Yan Kwong
20th November
1980
(continued)

Sd: Ron Bridge

R.G.B. Bridge
Director of Immigration

10

Encls

Distribution: Personal issue of all APIOs and above and to all AIOs and above on duty at Victoria Barracks during the grace period.

Departmental Secretary
D/Secy
Accountant (E)



15 No. 000001

Date:

Queensway Branch
Victoria Barracks
Queensway
Hong Kong
香港金鐘道43號警察總部
金鐘道分處

Photo
相片

INITIAL APPLICATION TO REGISTER FOR IDENTITY CARD
首次申請登記身份證

Mr.
Mrs.
Miss

先生
女士
小姐

has applied to be registered under the Registration of Persons Ordinance and has been given an appointment at _____ on _____

本處登記 (時 日) (月 年)

This form ceases to be valid for identification purposes after _____

本表格在下列日期以後將不能再作為身份證明文件使用 (月 年)

Left thumbprint/
fingerprint
左姆指印/指模

for Commissioner of Registration
人事登記處處長
(代行)

IMPORTANT
注意

This acknowledgement form is a valuable document which must be carefully preserved for identification purposes and it will not be possible for a duplicate to be issued if it is lost.

本表格為重要文件，持有人應小心保存，作為身份證明文件之用，如有遺失將不另行補發。

You should carry this form at all times while it is valid for identification purposes.

在本表格為身份證明文件之有效期間內，右端應時刻將之攜帶在身。

You must produce this form at the time of registration.

登記時須出示本表格。

If you are unable to keep this appointment, it is important that the Registration of Persons Office be informed as soon as possible, and certainly before this form ceases to be valid for identification purposes.

倘右端不能在約定之時間前來，務請在本表格為身份證明文件之有效期間內，儘早通知人事登記處。

On your return for registration, please enter through

Gate B

Gate C

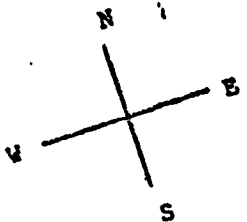
右端下次前來登記時，請從下列門口進入

乙間

丙間

No fee is payable for this form.

本表格由本處免費派發。



MTR
(QUEENSWAY)

DRIVE

QUEENSWAY

QUEEN'S RC

115.

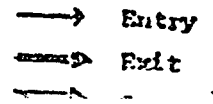
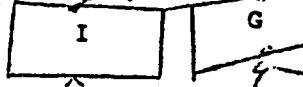
TREE

COTTON

VICTORIA BARRACK

Staff
Entrance
to Block
G & I

Staff
Entrance
to Block
HH



EXHIBITS

Appendix C

R1

Initial Registration Procedure

Affirmation of
Lam Yan Kwong
20th November
1980
(continued)

Storage, checking and pre-stamping of initial registration form

CIO(HK) is responsible for the storage of the initial registration forms in the strongroom in Block G at Victoria Barracks.

2. He will random check the details of the initial registration form, certifying on the front cover of each book he has inspected that it is in order and suitable for use. 10

3. Appointments for registration (on an hourly basis) will be arranged at a rate of 600 per day, between 0800 and 1600 hours, 6 days a week commencing on Monday 10 November 1980 at Queensway Branch Office in Blocks G and HH of Victoria Barracks. (Appointments for 1600 - 2359 hours daily will be arranged if the demand warrants). CIO(HK) is responsible for arranging for the appointment date and time to be pre-stamped on the initial registration form. He will also keep a record of the clerical staff performing the checking and stamping in an Issue and Return Register (Stamping). The clerical staff will certify on the front cover the serial number of forms checked and stamped. 20

Issue of initial registration form

4. The duty CIO in charge of initial registration CIO(IR) will obtain from R(QB) the key to the strongroom and will issue to the duty Clerk-in-charge on each floor the required quantity of ROP 85 against receipt in an Issue and Return Register (Clerk-in-charge). 30

5. The Clerk-in-charge will issue against receipt in an Issue and Return Register (Counter staff) to the counter staff in his shift one book of ROP 85 at a time before they commence duty.

Initial registration

6. The applicant will hand to the counter staff 3 identical photographs one of which will bear the applicant's name at the back. 40

7. The counter staff will :-

(i) complete ROP 85 in triplicate;

(ii) affix the applicant's photograph on each copy of the form;

EXHIBITS

R1

(iii) endorse the immigration stamp on the top right hand corner of the applicant's photograph;

Affirmation of
Lam Yan Kwong
20th November
1980

(iv) obtain the applicant's left thumb-print on the original and duplicate copies of the form;

(continued)

10

(v) give the original copy of the form and an ID 500a (for adult) or ID 500b (for children) to the applicant who may then leave;

(vi) hand to the Clerk-in-charge the duplicate and triplicate copies of the form as each book of 50 forms is finished and obtain from him a fresh book of forms;

20

(vii) return to the Clerk-in-Charge any unused form in his charge before he goes off duty.

Return of initial registration form

(i) record the return of ROP 85 in the Issue and Return Register (Counter staff);

30

(ii) immediately check that the duplicate and triplicate copies are intact, legible and contain a photograph of the applicant, referring to the Duty Officer should there be any discrepancy or suspected discrepancy;

40

(iii) take all 50 duplicate copies, secure them with a paper clip in strict serial number and attach a signed covering slip showing the first and last serial numbers. The bundle will be put into a confidential envelope, similarly marked DUPLICATE, and showing the first and last serial numbers and the programmed date of return appointment. The envelope will be sealed immediately and handed to CIO(IR) who will acknowledge receipt in the Issue and Return Register (Clerk-in-charge);

(iv) put each book of triplicate copies in a 'Confidential' envelope which he will seal immediately, marking the

EXHIBITS

R1

Affirmation of
Lam Yan Kwong
20th November
1980

(continued)

outside of the envelope 'TRIPLICATES' plus the serial numbers of the forms enclosed and the appointment dates and hand over the envelopes to CIO(IR) who will acknowledge receipt in the Issue and Return Register (Clerk-in-charge);

- (v) issue the unused ROP 85 to the Clerk-in charge of the next shift after detaching the duplicate copies of forms issued. 10

9. CIO(IR) will keep 'DUPLICATE' and 'TRIPLICATE' envelopes in the strongroom until the end of the initial registration period when he will return the strongroom key to R(OB). He will keep statistics of the initial registration forms used during his shift on an hourly basis showing the number of counters manned.

Disposal of initial registration forms

10. On Monday, 27 October 1980, CIO(HK) will:- 20

- (i) hand over the 'DUPLICATE' envelopes to R(QB) who will arrange for the forms to be kept securely in steel cabinets in the strongroom in Block G at Victoria Barracks in serial number order until the date of programmed appointment when the SIO(CO) will collect the 'DUPLICATE' envelopes against receipt in a register. R(QB) will have the sole access to the 'DUPLICATE' envelopes; 30
- (ii) arrange for the 'TRIPLICATE' envelopes (together with the secure stamps and registers) to be taken under secure custody to the Headquarters Confidential Registry where OCCR will store them in serial number order until further notice;
- (iii) return all unused ROP 85 to Accountant (E) for disposal.

Appendix D

EXHIBITS

Telephone Directory

R1

Affirmation of
Lam Yan Kwong

20th November
1980

(continued)

Command post (Block HH, basement)

Commanding Officer	5-274137
Duty APIO	5-275628
Duty IO	5-272807

Field operations (Block I, 1/S)

Duty CIO	5-271233
	or
	5-274103

10 Initial registration (Block G, 1/F)

Duty CIO	5-270255
	or
	5-275620

Block G, 1/F

Duty SIO	5-270257
----------	----------

Block HH, G/F

Duty SIO	5-275644
----------	----------

Block HH, 1/F

20

Duty SIO	5-274118
	5-274148

Block HH, 2/F

Duty SIO	5-274100
	5-273262

Block I, 1/F

Duty SIO	5-270738
----------	----------

This is the exhibit marked "LYK-3" referred to in the affidavit of Lam Yan Kwong sworn before me this 20th day of November 1980

30

Sd:
Antony NG Ming
Senior Judicial Clerk
SUPREME COURT
Commissioner for Oaths

EXHIBITS

R2

Affirmation of
Cheuk Koon Cham

20th November
1980

EXHIBITS

R2

AFFIRMATION OF CHEUK KOON
CHAM

1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus and
Subjiciendum

10

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING

Applicant

- and -

ATTORNEY GENERAL

Respondent

AFFIRMATION OF CHEUK KOON-CHAM

I, Cheuk Koon-cham of Hong Kong, Acting
Chief Immigration Officer do solemnly, sincerely
and truly affirm and state as follows :

1. I am an Acting Chief Immigration Officer
employed by the Hong Kong Government Immigra-
tion Department. I am presently attached to
the Victoria Immigration Centre within Victoria
Prison where I am the second officer in charge.

20

2. On the 29th of October, 1980 I was on
duty at the Victoria Immigration Centre.

3. On that date the Victoria Immigration
Centre was receiving and processing two cate-
gories of illegal immigrants. The first
category comprised illegal immigrants who had
been arrested by the Police as a result of their
inability to produce identification or evidence
of their immigration status (that is evidence
of their entitlement to be in Hong Kong).

30

EXHIBITS

R2

Affirmation of
Cheuk Koon Cham

20th November
1980

(continued)

10 4. The second class comprised illegal immigrants who had been processed by the Victoria Barracks Immigration Clearance Office during or after the "grace period" (that is the 24th of October until the 26th of October, inclusive) and who did not come within the so called "amnesty" (whereby the Government allowed illegal immigrants from China who had entered Hong Kong prior to the 24th of October, 1980 and registered for an identity card prior to the 27th of October, 1980 to have their applications processed without immediate repatriation).

20 5. Most of this second category of illegal immigrants had registered during the grace period and had then been given subsequent appointments for interviews at the Victoria Barracks Immigration Clearance Office. At the subsequent interviews if the illegal immigrants did not fall within the "amnesty" policy then they were sent over to the Victoria Immigration Centre for the purpose of being detained under Section 26(a) of the Immigration Ordinance pending a more detailed interview and an investigation of each person's case. The persons who fall within this category were those persons who were liable to arrest without warrant if allowed to return home and who did not qualify for the "amnesty" - so that they not only lacked any identity card or immigration permit but also they could not obtain either of these under the Government's policy.

40 6. The applicant was brought from the Victoria Barracks Immigration Clearance Office to the Victoria Immigration Centre on the 29th of October, 1980. I authorised his detention under Section 26(a) of the Immigration Ordinance and then instructed Acting Immigration Officer Kwong Kam-yuen to interview him and ascertain all the details of his case.

7. The normal procedure for cases such as the applicant's is that after the interview at the Victoria Immigration Centre Departmental records are checked and enquiries are made of employers and possibly relatives. I believe that this procedure was carried out in the applicant's case.

50 8. On the 31st October, 1980 (within the Section 26(a) 48 hours period) I signed an application for a removal order in respect of the applicant. That application is annexed and exhibited hereto and marked "C.K.C.-1". The

EXHIBITS

R2

Affirmation of
Cheuk Koon Cham

20th November
1980

(continued)

removal order and an order for detention
pending removal under Section 32(3A) is annexed
and exhibited hereto and marked "C.KC-2."
Notice of the Removal Order was given to the
applicant.

AFFIRMED at Courts of Justice)
Victoria, Hong Kong this)
20th day of November 1980) Sd:

Before me,

Sd:
Antony NG Ming
Senior Judicial Clerk
SUPREME COURT
A Commissioner for Oaths
a Commissioner for Oaths
JUDICIARY

10

No.1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

IN THE MATTER of NG YUEN SHIU 20
also known as NG KAM SHING

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus and
Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent 30

List of Exhibit referred to
in the Affirmation of
CHEUK KOON CHAM

Filed this day of 1980

<u>Exhibit Marked</u>	<u>Description</u>	<u>Date</u>	<u>Consists of Sheets</u>	<u>EXHIBITS</u> R2
"C.K.C.-1"	Application for a Removal Order	31.10.1980	1	Affirmation of Cheuk Koon Cham 20th November 1980

ATTORNEY GENERAL'S CHAMBERS
HONG KONG

(continued)

APPLICATION FOR A REMOVAL ORDER
UNDER SECTION 19(1)(b)(ii) OF THE
IMMIGRATION ORDINANCE (CAP.115)

10

1. SUBJECT

Name: Mr NG Yuen-siu @ NG Man-siu
@ NG Kam-shing @ NG Kwong-sang
@ NG Kwong-seng

Date and Place of Birth: 16 May 1951
In China

2. IDENTIFYING DOCUMENTS HELD

-

3. OTHER PERSONS INCLUDED IN THE APPLICATION

<u>Name</u>	<u>Relationship</u>	<u>Date and Place of Birth</u>
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20

-

4. OFFENCE COMMITTED

Illegal Remaining

5. The above-named was first interviewed by Immigration Officers on 29 October 1980 having been referred to VIC by OI(A) Investigation Division on 29 October 1980 following his arrest by OI(A) Investigation Division on 29 October 1980. During enquiries he claimed:

30

That he was born on 16 May 1951 in China and that he went to settle in Macao with his parents when he was about five years old. He further claimed that he previously entered Hong Kong illegally in 1967 but was removed to Macao on 19 February 1976 as a result of his identity card application. He admitted that he doubled back illegally by fishing junk on 5 March 1976 and has remained here since without permission.

EXHIBITS

R2

Affirmation of
Cheuk Koon Cham

20th November
1980

(continued)

Apart from an uncle, he has no other connections in Hong Kong. His parents and two brothers are in Macao. He is presently employed as a sewing machine technician.

6. The following enquiries have been made by Immigration Officers:

(a) Departmental records revealed that he was removed to Macao under a removal order on 12 March 1976 (BB 1631/69)

10

(b) Telephone check with his employer revealed that he has been working with the latter for the last 2 years.

7. Following upon paras. 5 and 6 above I believe that the subject entered Hong Kong on or about 5 March 1976 from Macao and that the subject does not possess the right to land in Hong Kong or the permission of the Director of Immigration to remain in Hong Kong. There are also no strong humanitarian grounds or other special aspects of the case which I consider would justify the subject remaining in Hong Kong.

20

I accordingly consider this to be a suitable case for the issue of a removal order under Section 19(1)(b)(ii) of the Immigration Ordinance (Cap.115).

Signed:

Appointment: CIO(VIC) K C CHEUK

Date: 31 October 1980

30

This is the exhibit marked "C.K.C.-1" referred to in the affirmation of Cheuk Koon Cham affirmed before me this 20th day of November 1980

Sd:

Commissioner for Oaths
Antony NH Ming
Senior Judicial Clerk
SUPREME COURT

ID 604

No.1019 of 1980

EXHIBITS

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

R2
Affirmation of
Cheuk Koon Cham

20th November
1980

(continued)

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

10

IN THE MATTER of an Application
for a Writ of Habeas Corpus and
Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

List of Exhibit referred to
in the Affirmation of
CHEUK KOON CHAM

20

Filed this _____ day of _____ 1980

<u>Exhibit Marked</u>	<u>Description</u>	<u>Date</u>	<u>Consists of Sheets</u>
"C.K.C.-2"	Removal Order	31.10.1980	1

ATTORNEY GENERAL'S CHAMBERS
HONG KONG

EXHIBITS

R2
Affirmation of
Cheuk Koon Cham
20th November
1980
(continued)

D
thro' PIO(VIC)

Removal order applications in respect of three persons are at float. The case files are attached for your perusal. The circumstances of the persons concerned have been examined and I am satisfied that none has :-

- (i) the right to land;
- (ii) permission to remain; and 10
- (iii) that there are no strong humanitarian or other circumstances which would warrant any being allowed to stay.

2. The persons named in the applications are :-

<u>Application No.</u>	<u>Name</u>	<u>File Ref.</u>	
(1)	Mr. NG Yuen-siu @ NG Man-siu @ NG Kam-shing @ NG Kwong-sang @ NG Kwong-seng	RBV/2/80	20
(2)	Mr. LAM Siu-sham @ LAM Siu-sum @ LAM Shu-wing	RBV/5/80	
(3)	Mr. CHAN Chiu-wai @ CHAN Chek-koi	RBV/3/80	

3. I recommend their removal to China under Section 19(1)(b) and their detention pending removal under Section 32(3A) of the Immigration Ordinance, Cap.115. 30

K.C.CHEUK
CIO(VIC)
31-10-1980

M 2

PIO(VIC)

I have considered the individual applications in respect of the 3 persons named above and hereby order the removal of the persons named in applications number 1-3 to China under Section 19(1)(b) of the Immigration Ordinance. I also authorise their detention pending removal under Section 32(3a). 40

Sd: R.G.Bridge
Director of Immigration
31-10-1980

ID607

EXHIBITS

R2

Affirmation of
Cheuk Koon Cham

20th November
1980

(continued)

This is the exhibit marked C.K.C.-2
referred to in the affirmation of Cheuk
Koon Cham affirmed before me this 20th
day of November 1980

10 Sd:
Antony NG Ming
Senior Judicial Clerk
SUPREME COURT
Commissioner for Oaths.

EXHIBITS

R3

AFFIRMATION OF KWONG KAM YUEN

R3

Affirmation of
Kwong Kam Yuen

20th November
1980

No. 1019 of 1980

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

20 IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus and
Subjiciendum

BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING

Applicant

- and -

30 ATTORNEY GENERAL

Respondent

EXHIBITS

AFFIRMATION OF KWONG KAM YUEN

R3
Affirmation of
Kwong Kam Yuen
20th November
1980
(continued)

I, Kwong Kam-yuen of Hong Kong, Acting Immigration Officer do solemnly, sincerely and truly affirm and state as follows :

1. I am an Acting Immigration Officer employed by the Government of Hong Kong Immigration Department. I am presently attached to the Victoria Immigration Centre within Victoria Prison.

2. I was on duty at the Victoria Immigration Centre on the 29th of October, 1980. I have read the affirmation of the applicant dated the 18th of November, 1980 and I believe that I am the immigration officer to whom he refers in paragraph 8 therein. I interviewed the applicant at the Victoria Immigration Centre on the 29th of October, 1980 and a copy of the record of that interview is annexed and exhibited hereto and marked "K.K.Y.-1". 10

3. After the interview I passed the file with the record of interview attached to the Senior Immigration Officer of the initial processing centre at the Victoria Barracks Immigration Clearance Office so that further enquiries could be made. 20

AFFIRMED at Courts of Justice)
Victoria, Hong Kong this 20th) Sd: K.Y.Kwong
day of November, 1980)

Before me,
Sd:
Antony NG Ming
Senior Judicial Clerk
SUPREME COURT
A Commissioner for Oaths
a Commissioner for Oaths
JUDICIARY

30

No. 1019 of 1980

EXHIBITS

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

R3

Affirmation of
Kwong Kam Yuen

20th November
1980

(continued)

IN THE MATTER of NG YUEN SHIU
also known as NG KAM SHING

- and -

IN THE MATTER of an Application
for a Writ of Habeas Corpus and
Subjiciendum

10 BETWEEN:

NG YUEN SHIU also known
as NG KAM SHING Applicant

- and -

ATTORNEY GENERAL Respondent

List of Exhibit referred to
in the Affirmation of
KWONG KAM YUEN

Filed herein on the day of 1980

20	<u>Exhibit Marked</u>	<u>Description</u>	<u>Date</u>	<u>No. of Sheets</u>
	"K.K.Y.-1"	Immigration Interview Report V I C	29.10.1980	4

ATTORNEY GENERAL'S CHAMBERS
HONG KONG

EXHIBITS

R3

Affirmation of Kwong Kam Yuen 20th November 1980 (continued)

Ref. No.: RDV/ 218

IMMIGRATION INTERVIEW REPORT V I C

A. Personal Particulars

1. Full name NG YUEN SIU (English) 吳 潤 錫 (Chinese) 0702 61761 4801 (C.C.C. Nos.)
Aliases NG MATV SIU (English) 吳 錫 錫 (Chinese) 0702 2427 4801 (C.C.C. Nos.)
NG KAM SHING (English) 吳 錦 城 (Chinese) 0702 6351 1004 (C.C.C. Nos.)

2. Age/Date of birth 16-5-1951 Sex [X] Male Marital status [] Married [X] Single [] Female

3. Place of birth Chung Shan Claimed nationality Chinese

4. Occupation Garment Maker Languages/Dialects spoken Cantonese

5. Family details:

Table with columns: Name, Age, P.O.B., Whereabouts. Rows include Father (NG CHIA PO), Mother (YU SHENG HAN), Husband/wife (N/A), Children (N/A), Brothers (NG CHI HUNG, PING HUI), Sisters (- N/A -), Others (Uncle (Brother of Father), NG PING).

This is the exhibit referred to in the affidavit of K. K. Y. in the Affirmation of Kwong Kam Yuen etc. on 20th day of November 1980.

I.D. 600 20 NOV 1980 Anthony Ming Senior Judicial Clerk & Commissioner for Oaths SUPREME COURT JUDICIARY

EXHIBITS

R3

Affirmation of Kwong Kam Yuen 20th November 1980 (continued)

6. Background:

Before Hong Kong

Hong Kong

Address 澳門 沙環 新 街 170 號, 2 樓 20 F. 電話 930 111 74 8 915

Tel. No. 3-958736

Name/address of employer 澳門 沙環 新 街 170 號, 2 樓 20 F. 電話 930 111 74 8 915

Tel. No. 3-958736

Occupation/position held Sewing Machine technician

General background (inc. residence in other countries, schooling, family movements etc.)

Subject was born at Chungshan China, and was the eldest child in the family. At the age of 5-6, he went over to Macao with his parents and settled in Macao ever since. He received education and apprenticeship at Macao, and first came to Hong Kong as I.I. in 1967. He earned his living in Hong Kong as Mechanic and surfaced for the registration of HK IC at about 1970. He was discovered to be I.I. from Macao, and R.O. was subsequently issued and enforced against him on 19-2-1976. After staying only a month in Macao, he broke the R.O. and illegally ^{departed} ~~returned~~ back to Hong Kong on 5-3-1976 and went ~~undiscovered~~ ^{undiscovered}. (2) On 21-10-1980, with the desire to secure HK IC, he surfaced at CO (US) for registration. He was arrested by one officer, and finally transported to V.I.C. (3) From Encl. (1) Subject established himself to be an ex-remover from Macao.

Lyfman (10/11/80)

EXHIBITS

R3

Affirmation of
Kwong Kam Yuen
20th November 1980

E. Arrest (continued)

1. Arrested by Immigration Officer at Co. (UB)
with 7 others at 11.02 hours on 29.10.1980
Arrived at V.I.C. at 11.35 hours on 29.10.1980

2. Subject's initial claim/statement to arresting authority

Subject stated openly to our officers at Co. (UB) during his intended registration for HK 46 that he was formerly a resident in Macau on 1976 and returned to HK from Macau after only one month stay in Macau

3. Action taken to verify subject's initial claim/statement before arrival at V.I.C.

.....
.....
.....
.....
.....

4. Travel documents/identifying papers in possession

C. Route of illegal entry

Journey commenced on 5 March 1976 from Hk 13 Macau
via Lantau Island by fishing junk via by
via by/via by
via by to Shau Ki Wan H.K. Island

Border crossing point P. 52 Date and Time 6.3.1976 about 08.00h

Party comprised about 40 persons including about 26 male adults
female adults and 6 children; of whom the following were related to the immigrant:—

Name Sex Age Relationship

.....
.....
.....
.....
.....
.....
.....
.....

Affirmation of Kwong Kam Yuen 20th November 1980 (continued)

Entered by: Boat Land Swimming

Reason for coming ... Hoping for a better living in an advanced country

Means of transport to town: by ship via the Kowloon and New Territories to Kwai Chung

How journey organized/by whom, etc. ... through the introduction from friends in Macao

Particulars of aiders/abettors in Hong Kong with the local Commission of ...

... Mr. Uncle NG Lin (P. H.K.) now residing at ...

Details of advantages offered ... about HK\$ 900 -

Whether having served with the Militia Yes No

Remarks ... Subject never visited China since his birth at ... living and residence in Macao and Hong Kong

D. Immigration Officer's assessment

- 1. Believed from China Suspected from Macao Possible long-term H.K. resident Other

2. Not eligible for stay—Removal recommended

3. May be eligible for stay by virtue of:

Table with columns: Strong possibility, Weak possibility. Rows: Hong Kong Belonger status, Chinese Resident status.

4. Not eligible for stay but humanitarian reasons/claims to be a political refugee/possible publicity needs to be considered

- 5. Further enquiries needed. Refer to: OI(A) Section GI Section Other

6. Release and process for stay not not not checked.

Completed by:

Name and rank KINONG KAM YUEN 10(VIC)IP.

Signature [Signature]

Date and time 21.10.1980 at 1535 hours

EXHIBITS

R3

Affirmation of
Kwong Kam Yuen - 20th November 1980 (continued)

P - E. Senior Immigration Officer's recommendation

1. Further enquiries be pursued by *CI(A) Section*

2. Subject be released on the following grounds

.....

.....

.....

3. Subject be continued to be detained on the following grounds:

.....

.....

.....

4. Subject be removed to China

I am satisfied that:

- (a) the subject does not have the right to land in Hong Kong.
- (b) the subject does not have the permission of the Director of Immigration to remain in Hong Kong.
- (c) there are no strong humanitarian or other special factors which need to be considered.
- (d) there is no likelihood of widespread public sympathy in this case.
- (e) the subject is not a political refugee or likely to face excessively hard punishment if removed.

5. Other

.....

.....

.....

Name and rank: *K H LAU Sr. (10) IP*

Signature: *[Signature]*

Date: *20 OCT 1980*

EXHIBITS

R3

Affirmation of
Kwong Kam Yuen
20th November 1980
(continued)

F. Chief Immigration Officer's action

Signed:

Date:

G. REMOVAL ORDER

Removal ordered and detention authorized under Section 32(3A) of the Immigration Ordinance
on

Removal order served on

at

by

Signed:

Date:

EXHIBITS

R3

Affirmation of
Kwong Kam Yuen
20th November 1980
(continued)

E. APPEAL

1. Subject did not appeal within 24 hours
Subject stated in writing he did not wish to appeal
Subject appealed on on legal grounds
..... on other grounds

2. Immigration action pending or arising from appeal

3. Appeal papers submitted to Chief Adjudicator at hours on

4. Result of appeal:

Allowed

Dismissed

Reasons:

Signed:

Rank:

Date:

EXHIBITS

R3
Affirmation of
Kwong Kam Yuen (Continued)

EXHIBITS

R3
Affirmation of
Kwong Kam Yuen
20th November 1980
(continued)

I. Conclusion of case

1. Subject repatriated to China at hours on
2. Other

Signed:

Rank:

Date:

J. Telephone calls made by subject

Date	Time	Number	Person called	Remarks
24.10.80	15.25 hours.	3-958776	Mr Kwong Chi-pang (梁志平)	Exec officer. A10 Y. K. Ngai confirmed from call that subject had been working there for the last 2 years, and in the call subject informed Mr Kwong of his present detention at vic. solicitor.
31-10-80	1421-1425.	5-432113.	梁家傑律師	
2.11.80	10.45 hrs.	H-456234- call 186	a friend via Louis Yung Yung 梁榮禧	with a view to call his friend to pay a visit to him at (vic)

IN THE PRIVY COUNCIL

No.16 of 1982

O N A P P E A L
FROM THE COURT OF APPEAL HONG KONG

B E T W E E N :

THE ATTORNEY GENERAL

Appellant
(Respondent)

- and -

NG YUEN SHIU also known
as NG KAM SHING

Respondent
(Applicant)

(and CROSS-APPEAL)

RECORD OF PROCEEDINGS

MACFARLANES,
Dowgate Hill House,
London, EC4R 2SY

Solicitors for the
Appellant

HEWITT, WOOLLACOTT &
CHOWN,
113 Cannon Street,
London, EC4

Solicitors for the
Respondent