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CACV 87/2010

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF APPEAL  
CIVIL APPEAL NO. 87 OF 2010  
(ON APPEAL FROM HCAL NO. 75 OF 2009)**

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BETWEEN

ASIF ALI

Applicant

And

DIRECTOR OF IMMIGRATION

1<sup>st</sup> Respondent

SECRETARY FOR SECURITY

2<sup>nd</sup> Respondent

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Before: Hon Stock VP, Fok JA and Lam J in Court

Date of Hearing: 30 November 2011

Date of Judgment: 30 November 2011

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**J U D G M E N T**

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Hon Stock VP:

1. We handed down judgment in this matter on 28 June 2011. The main issue was the effect of section 2(4)(b) of the Immigration Ordinance, Cap. 115 upon a period of remand in custody pending trial that results in a conviction and the question was whether that period was excluded from categorization as a period of ordinary residence. We held that it was not excluded.

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2. The respondent now seeks leave to appeal to the Court of Final Appeal under section 22(1)(b) of the Court of Final Appeal Ordinance, Cap. 484 on the basis that questions involved in the appeal are of great general public importance or otherwise ought to be submitted to the Court of Final Appeal for decision.

3. The questions which are suggested to be involved are:

(1) Whether upon the true construction of section 2(4)(b) of the Immigration Ordinance, Cap. 115, a period of remand in custody pending a criminal trial that results in a conviction and a sentence of imprisonment, or more generally a period of remand in custody pending a criminal trial, is within the meaning of the words “any period ... of imprisonment or detention pursuant to the sentence or order of any court” as they appear in that subsection;

(2) If the answer to Question 1 is “yes”, whether such construction of section 2(4)(b) of the Immigration Ordinance is precluded by the decisions of the Court of Final Appeal in *Fateh Muhammad v Commissioner of Registration & Anor* (2001) 4 HKCFAR 278 and/or *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26;

(3) If the answer to Question 2 is “yes”, what are the circumstances in which the Court of Final Appeal may depart from its previous decisions, and whether the Court of Final Appeal should depart from its previous decisions in *Fateh Muhammad* and *Prem Singh* in so far as the proper interpretation of section 2(4)(b) of the Immigration Ordinance is concerned;

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(4) Whether, apart from and notwithstanding section 2(4)(b) of the Immigration Ordinance, a person who is remanded in custody pending a criminal trial that results in a conviction and a sentence of imprisonment, or more generally a person who is remanded in custody pending a criminal trial, is not to be regarded as “ordinarily resided” in Hong Kong during the period of remand for the purpose of paragraph 2(d) of Schedule 1 to the Immigration Ordinance (corresponding to Article 24(2)(4) of the Basic Law).

4. The main issue to which we have referred is in our opinion an issue of significant general public importance and we are of the opinion that leave should be granted on the basis of the first and fourth questions posed by the Notice of Motion. The second and third questions are, it seems to us, subsumed in the first and fourth and, in any event, whether leave (if such leave is necessary) should be granted in respect of those questions is more suitable for determination by the Court of Final Appeal.

5. Accordingly since, in our opinion, the first and fourth questions are clearly suitable for determination by the Court of Final Appeal, leave to appeal is granted.

(Frank Stock)  
Vice-President

(Joseph Fok)  
Justice of Appeal

(M H Lam)  
Judge of the  
Court of First Instance

Mr Hectar Pun instructed by Messrs Yip & Liu, assigned by Director of Legal Aid for the Applicant

Mr Anderson Chow, SC and Ms Eva Sit, instructed by Department of Justice for 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent