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HCAL100/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 100 OF 2011

BETWEEN

SALIM MOHAMMED — Applicant

and

DIRECTOR OF IMMIGRATION — Putative Respondent

Before : Hon Au J in Court

Date of Hearing: 25 November 2011

Date of Judgment: 25 November 2011

Date of Reasons for Judgment: 25 November 2011

REASONS FOR JUDGMENT

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A. Introduction

1. The Applicant is a Bangladeshi national and is presently in detention under the custody of the Department of Immigration ("the Department"), pending removal to his home country.

2. This is the Applicant's application for a writ of *habeas corpus.*

3. He made an *ex parte* application for leave to issue the same in the late afternoon of last Friday, 18 November 2011. He was brought before the Court on Tuesday, 22 November 2011, where Ms Bethany Choi, Senior Government Counsel for the Director of Immigration ("the Director") also appeared on notice. I adjourned the application to an *inter parte* hearing to today (Friday, 25 November 2011) to enable the papers in support of the application to be provided to the Director. Further, in light of the Applicant's submissions in Court on that day, I also directed the Applicant to file a further supporting affirmation and the Director to respond by affirmations before the *inter partes* hearing.

4. The parties have since filed their evidence.

5. After hearing submissions, I dismissed the application with reasons to follow. I now give them.

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B. Brief background

6. The Applicant entered Hong Kong on 7 January 2005 with a Bangladeshi passport and was permitted to remain until 21 January 2005 as a visitor.

7. But he had overstayed in Hong Kong.

8. A removal order ("the Removal Order") was made by the Assistant Director of Immigration on 9 May 2007, pursuant to s. 19(1)(b)(ii) of the Immigration Ordinance, Cap 115 ("the Ordinance"), on the basis that the Applicant had contravened a condition of stay.

9. The Applicant's appeal against the Removal Order was dismissed by the Immigration Tribunal on 22 May 2007. There has been no challenge to the validity of the Removal Order by way of judicial review.

10. However, in view of, amongst others, the Applicant's then pending refugee status claim with the United Nations High Commissioner for Refugees ("UNHCR") and claim under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), the Applicant was released on recognizance on 9 June 2007.

11. The Applicant's refugee status clam was closed on 30 November 2007.

12. The Applicant's CAT claim was also refused on 28 March 2011 and the subsequent petition was also dismissed on 4 May 2011.

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There is no application for judicial review against the Director's said refusal or the dismissal of the petition.

13. On 13 May 2011, the Applicant was married to one Madam Zuo, who is a Hong Kong permanent resident.

14. On 17 May 2011, the Applicant applied to the Other Visas and Permits Section ("the Visas Section") of the Department for a dependent visa to take up residence in Hong Kong as a dependent of Madam Zuo, his sponsor wife

15. At the same time, the Applicant has been re-detained since 20 May 2011 under s. 32(3)[1] of the Ordinance, and is now due to be removed.

16. By a letter ("the Invitation Letter") dated 25 October 2011 addressed to Madam Zuo (c/o Messrs Yip & Liu), the Visas Section invited both the Applicant and Madam Zuo to attend an interview at the Immigration Tower on 30 November 2011 for the purpose of assessing the dependant visa application and to provide various documents (both original and copy) listed in the letter.

17. Apparently, the Applicant then asked to be released from detention on recognizance so that he could attend the interview. By a letter dated 2 November 2011 sent to Messrs Yip & Liu, the Clearance Section ('the Clearance Section") of the Department stated that, as they

understood it from the Visas Section, the Applicant's physical attendance at the interview was not required for the purpose of the dependent visa application. They therefore refused to release the Applicant on recognizance at that stage.

18. In light of this refusal, as mentioned above, the Applicant now acting in person made the *ex parte* application for a writ of *habeas corpus* on 18 November 2011, seeking to be released from detention so that he could attend the interview. At the first hearing of the application, he also said he needed to be so released in order to be able to obtain some of the documents required under the Invitation Letter.

C. The present application

19. As submitted by Ms Choi for the Director, the real issue for the Court to decide in this *habeas corpus* application is whether the detention is lawful, that is, whether the Applicant is detained without authority or whether the purported authority is outside the power of the person who authorized the detention. As said by Stock J (as he then was) in *Fidelis AQhuwaraezeama Emem v Superintendent of Victoria Prison* [1998] 2 HKLRD 488 at 453C-D and 455A-B:

> "Now the purpose of an application for *habeas corpus* is to determine whether there is lawful authority for a detention. It is not to determine the reasonableness of any decision or whether there has been some failure to observe the rules of natural justice. Those are matters properly within the realm of judicial review.

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[1] Which provides that "*A person in respect of whom a removal order under section 19(1)(b) is in force may be detained under the authority of [the Director], the Deputy Director of Immigration or… pending his removal from Hong Kong under section 25.*"

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> …
>
> In conclusion I say this. I am here to examine the legality of the detention and that is all. Once it is shown that the underlying facts for the exercise of the powers existed, then that is the end of the matter."[2]

20. As helpfully summarized by Ms Choi in her skeleton, the Applicant's grounds of application as set out in his two supporting affirmations are that he asks to be released on recognizance to:

(1) Attend the interview with the Visas Section on 30 November 2011 in relation to his dependent visa application as set out in the Invitation Letter.

(2) Collate supporting documents for his said application.

21. I agree with Ms Choi that none of the above grounds amount to disputing or challenging the validity or legality of the Removal Order. In other words, there is nothing in the application which shows that the Applicant's detention is in any way unlawful.

22. Moreover, in light of the background facts set out above (which are not challenged), the Removal Order is clearly made with proper authority and lawful.

23. In these circumstances, this *habeas corpus* application has no merits and should be dismissed.

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[2] See also: *Thang Thieu Quyen v The Director of Immigratoin* (1997-1998) 1 HKCFAR 167 at 187D-E *per* Chief Justice Li.

24. Notwithstanding the above, I believe it is at least arguable that there is *prima facie* unreasonableness (in the *Wednesbury* sense) in the Department's decision not to offer any reasonable alternative arrangements to enable the Applicant (albeit in lawful detention) to attend the scheduled interview (of which the Applicant was invited to attend) on the ground that the Applicant's physical presence was not *mandatorily* necessary for the interview. I therefore was originally prepared to consider treating the present application as an application for leave to apply for judicial review against such a decision.

25. However, I have finally come to the conclusion that it is unnecessary to do so in light of:

(1) The Director's now evidence (as set out in paragraph 5 of Mr Jacky Wong's Affirmation filed on 24 November 2011) that the Visas Section can make alternative arrangement to meet the Applicant and Madam Zuo for the purpose of the interview; and

(2) The Director's undertaking made to the Court at the hearing on 25 November 2011 to make arrangements to enable the Applicant and his sponsor to attend, if they so wish, the interview in relation to his dependent visa application now scheduled to take place on 28 November 2011 at 2:30 pm or on any other day not later than 30 November 2011 at the Castle Peak Bay Immigration Centre.

26. At the hearing, the Applicant also asked not to be removed back to Bangladesh as he would face many problems and difficulties there,

and also asked to stay in Hong Kong while his dependant visa application was being processed.

27. These are matters not within the purview of a *habeas corpus* application as they do not relate to any challenge on the lawfulness of the detention or the validity of the Removal Order. In particular, as mentioned above, his CAT claim and refugee status claim have all been dismissed[3].

28. I should also mention that the Department's affirmation evidence filed (which is not challenged) also shows that:

(1) While in detention, the Applicant do have reasonable access to means of communications with the outside world. He can have and has been having access to the use of telephone to make communications with others. He has also received 54 visits (2 legal visits and 52 social visits) since his detention in May 2011. He therefore should not have any real difficulties in liaising with any necessary parties to obtain any documents he needs in relation to his dependent visa application. In any event, at the forthcoming interview, the Applicant can explain to the Visas Section as to why he is unable to obtain some of the documents, if that is the case, at the present stage.

[3] The Applicant lodged his second refugee status application with the UNHCR on 14 April 2011 (after his CAT claim was refused). However, this application was refused by the UNHCR on 9 November 2011.

(2) It is usual that the applicant for a dependent visa is not present in Hong Kong while the application is being processed.

(3) The Applicant should be able to obtain whatever documents required for that application when he is back in Bangladesh.

29. In the circumstances, there is nothing before me to justify any relief to be granted under the present application or the need to treat the application as an application for leave for judicial review.

D. Conclusion

30. For these reasons, I refuse the application. I also make no order as to costs.

(Thomas Au)
Judge of the Court of First Instance
High Court

The Applicant, appearing in person.

Ms. Bethany CHOI, Senior Government Counsel of the Department of Justice, for the Respondent.

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C O R R I G E N D U M

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1. Paragraph 15 of the judgment should read as follows:

> "15. At the same time, the Applicant has been re-detained since 20 May 2011 under s. ~~32(3)~~[1] 32(3A)[1] of the Ordinance, and is now due to be removed."

2. A typographical error in paragraph 19 of the judgment as follows:

> "19. … As said by Stock J (as he then was) in *Fidelis ~~AQhuwaraezeama~~ Ahuwaraezeama Emem v Superintendent of Victoria Prison ...*"

(C.F. Tam)
Clerk to Hon Au J
High Court