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HCAL 100/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 100 OF 2006

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BETWEEN

‘A’ Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 10/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 10 OF 2007

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BETWEEN

‘AS’ Applicant

and

DIRECTOR OF IMMIGRATION Respondent

———————

AND

HCAL 11/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 11 OF 2007

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BETWEEN

‘F’ Applicant

and

DIRECTOR OF IMMIGRATION Respondent

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AND

HCAL 28/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 28 OF 2007

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BETWEEN

‘YA’ Applicant

and

DIRECTOR OF IMMIGRATION Respondent

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(HEARD TOGETHER)

Before : Hon A Cheung J in Court
Date of Hearing : 5 February 2009
Date of Judgment : 3 March 2009

J U D G M E N T

Introduction

1. By a judgment handed down on 18 July 2008 ([2008] 4 HKLRD 752), the Court of Appeal allowed the claims of the four applicants in these four sets of proceedings and declared that their detentions during the following periods under the authority of the Director of Immigration or the Secretary for Security were unlawful for violation of art 5(1) of the Hong Kong Bill of Rights. 'A' was detained from 14 June 2006 to 14 September 2006, ie a period of three months. 'AS' was detained from 14 June 2005 to 29 March 2007, ie a period of 655 days. 'F' was detained from 5 July 2005 to 29 March 2007, a period of 634 days. 'YA' was detained from 25 October 2006 to 29 March 2007, that is to say, for a period of 156 days.

2. The Court is now tasked with the assessment of damages for their unlawful detentions. Each of them claims basic or ordinary damages, aggravated damages and exemplary damages.

3. All applicants were torture claimants under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). They were all detained by the authorities pending verification of their CAT claims pursuant to s 32 of the Immigration Ordinance (Cap 115). The Court of Appeal held that the powers to detain under s 32 pending such verification were lawful under domestic law. However, they infringed art 5(1) of the Hong Kong Bill of Rights which requires that detention must not be arbitrary and the grounds and procedure for detention must also be certain and accessible. The Court of Appeal held that in the absence of a published policy as to the circumstances under which the powers to detain pending such verification would be exercised, the powers of detention under s 32 were to that extent contrary to art 5(1) of the Bill of Rights.

4. The detentions in the instant cases were, in those circumstances, declared by the Court of Appeal to be unlawful. The period of unlawful detention, in each case, commenced from the date when the relevant CAT claim was made and ended on the day when the applicant was granted bail or released on his own recognizance. Periods of detention prior to the making of the CAT claims are not in issue.

5. It is useful here to summarise the undisputed facts of each case.

Case of 'A'

6. 'A' is an Algerian. He was born in Algeria on 7 February 1972 and is now 37 years old. He claims that he will be tortured if returned to Algeria on account of dealings with an Islamic fundamentalist

group. He came to Hong Kong as a visitor on 6 November 2003 and was given permission to remain until 20 November 2003. On 18 November 2003, before his permission to remain expired, he made an application to the United Nations High Commissioner for Refugees (UNHCR) for recognition of his refugee status under the High Commissioner's mandate. On the following day, he told the Director of Immigration about his application and asked for his stay to be extended, which was refused. He thus became an overstayer and went underground for a lengthy period of time, after the expiration of his permission to stay. In the meantime, he pursued his claim for refugee status with the UNHCR.

7. In February 2006, 'A' began to cohabit with a permanent Hong Kong resident in Sheung Wan. On 23 May 2006, the two of them filed a 'notice of intended marriage' with the Marriage Registry, giving notice of their intention to marry each other on 12 June 2006. Six days before they were due to get married, 'A' was arrested by the police for overstaying. He was detained by the Director of Immigration on the same day under s 26(a) of the Immigration Ordinance (power to detain for inquiry).

8. Whilst being detained under s 32(2A) of the Ordinance (power to detain pending a decision whether to make a removal order), 'A' made a CAT claim on 16 June 2006, more than two years and seven months after he arrived Hong Kong. On the following day, a removal order was made against him and he was detained by the Director pending his removal pursuant to s 32(3A).

9. ‘A’ went on a hunger strike on 4 July 2006 to protest against his detention, possible return to Algeria and separation from his fiancée. After receiving counselling, he resumed eating on 10 July 2006.

10. ‘A’ made requests for release on recognizance in June and July 2006. They were refused on 6 August 2006 by the Director, regard having had to his adverse immigration record of having gone underground and overstayed for two years and seven months and the fact that the Director intended to remove him as soon as possible.

11. On 7 September 2006, ‘A’ made an application for leave to apply for judicial review. On 13 September 2006, leave was granted and ‘A’ was granted bail by order of Hartmann J (as he then was). On the following day, he was released from detention.

12. In total ‘A’ was detained for a relevant period of three months.

13. ‘A’ has since married the woman whom he had planned to marry prior to arrest and detention.

14. On 12 September 2007, the CAT claim of ‘A’ was rejected by the Director of Immigration. On 12 October 2007, ‘A’ petitioned the Chief Executive under art 48(13) of the Basic Law against the Director’s refusal of his CAT claim. No decision on the petition has yet been reached.

Case of 'AS'

15. The facts pertaining to the case of 'AS' are likewise uncontroversial. 'AS' is a Sri Lankan Tamil. He was born on 29 March 1975 and is now 33 years old. His claimed fears are that he will be tortured and even killed by his business partners who have connections with the Government there if he ever returns to Sri Lanka. Furthermore, by reason of his ethnicity and the fact that he has lost his Sri Lankan identity card, he fears that he will be tortured by the police if he is returned there.

16. He first entered Hong Kong from Sri Lanka on 2 March 2003 using his own passport. He departed on 8 March 2003 and returned on the following day. He was permitted to remain as a visitor until 14 March 2003. On 12 March 2003, he approached the Immigration Department for an extension of stay but the application was refused. He did not depart upon the expiry of his permission to stay but went underground. His own passport was given to an agent and was used by another for leaving Hong Kong on 16 March 2003. On 5 May 2003, 'AS' departed Hong Kong for the Mainland via Lo Wu using a Sri Lankan passport belonging to his cousin. He was found out by the Mainland authority and returned to Hong Kong. He was refused permission to land but was admitted to hospital for medical treatment. On 9 May 2003, 'AS' absconded from custody during hospitalisation. He claimed that he later obtained a passport bearing another identity and went back to Sri Lanka in July 2003.

17. Since 1 January 2004, 'AS' travelled to Hong Kong on a number of occasions using his own passport. He last arrived in Hong

Kong on 20 September 2004. On 25 September 2004, he was intercepted by the police when he went to stand surety for his friend and was handed over to the Immigration Department for inquiries. He was then charged with two counts of immigration offences (namely, 'transfer to another without reasonable excuse a travel document' and 'making a false representation to an immigration assistant'), and on his conviction, he was sentenced to 12 months' imprisonment.

18. On 23 May 2005, three days before he served out his term of imprisonment, the Secretary for Security made a deportation order against 'AS'. He was detained under s 32(3) following his discharge from prison on 26 May 2005. He was scheduled to be removed on 2 June 2005, but that was withheld because he had made a legal aid application three days before to challenge the deportation order. He further made a CAT claim on 6 June 2005, that is to say, more than two years and three months after he first visited Hong Kong.

19. 'AS' requested for release on recognizance in 2005 and 2006. Those requests were refused on the ground that in light of his previous history of being a repeated offender with a record of absconding while under detention in 2003, there existed a real risk of his absconding and re-offending.

20. On 25 January 2007, 'AS' made an application for leave to apply for judicial review. On 29 March 2007, five days before the substantive court hearing, 'AS' was released on recognizance. In total, the relevant period of detention was 655 days.

21. To complete the story, on 25 May 2007, the Director of Immigration informed 'AS' that his CAT claim was refused. He petitioned the Chief Executive against the refusal, but the petition was rejected on 3 October 2007.

22. 'AS' complains about the effect of detention and not seeing daylight. He also complains of the difficulties of getting evidence to back his claim.

Case of 'F'

23. The case of 'F' is also common ground.

24. 'F' is a Sri Lankan Sinhalese. He was born in Sri Lanka on 3 May 1977 and is now 31 years old. His claimed fears are that he will be tortured and possibly killed by the family of his deceased girlfriend who are Tamil and are connected with influential political figures and authorities.

25. On 18 April 2005, he was arrested by the police for the offence of failing to carry an identity card and suspicion of overstaying. He claimed to have entered Hong Kong on 13 October 2002 with his passport which he had lost on 15 October 2002. He admitted to having overstayed since 21 October 2002. According to immigration records, there was a departure record using a passport in the name of 'F' on 19 October 2002 but he denied any knowledge of such departure.

26. 'F' was subsequently prosecuted for breach of his condition of stay by overstaying since 21 October 2002. He pleaded guilty and

upon his conviction, he was sentenced to two months' imprisonment on 28 April 2005.

27. He was discharged from prison one month later on 28 May 2005 and was immediately placed under administrative detention pending a decision as to whether a removal order would be issued against him. On 30 June 2005, a removal order was made against him. On the same day, he was placed under administrative detention pursuant to s 32(3A) of the Immigration Ordinance pending his removal.

28. On 5 July 2005, 'F' made a claim under CAT, more than two years and nine months after he first entered Hong Kong.

29. 'F' requested release on recognizance on 14 September 2005, which was finally rejected on 10 August 2006 after a number of interviews, in which information and supporting materials were sought from 'F'. The Director considered that there was a high risk of 'F' absconding (– his refugee status application had been rejected by UNHCR on 12 May 2006 at first instance and on 17 July 2006 on appeal and his CAT claim was rejected on 6 March 2006, he had overstayed in Hong Kong for nearly two and a half years without any proof or document of identity and he had no family connection or a fixed abode in Hong Kong), and because he had failed to provide a surety for recognizance and to support his living.

30. On 6 July 2006, 'F' went on a hunger strike and requested that he be released on recognizance. It lasted four days.

31. ‘F’ made an application for leave to apply for judicial review on 30 January 2007. Leave was granted on 5 February 2007. On 29 March 2007, five days before the substantive hearing of the application for judicial review, ‘F’ was released on recognizance. In total, the relevant period of detention amounted to 634 days.

32. As mentioned, the CAT claim of ‘F’ was refused on 6 March 2006. A petition against the refusal was rejected on 4 October 2007.

33. ‘F’ makes complaints about his conditions of detention and their effect on him.

Case of ‘YA’

34. Finally, the case of ‘YA’. The undisputed facts are that ‘YA’ is from Togo, West Africa. He is Ewe in ethnic origin. He was born on 26 January 1979 and is now 30 years old.

35. His story is that in 2005, a civil war broke out between opposing political factions, in one of which ‘YA’ was an active member. An attempt to arrest him was made in April 2005 but he managed to escape. Yet his wife was less fortunate; she was arrested and tortured. As a result, ‘YA’ fled to Benin where he registered as an asylum seeker with the local UNHCR there. He was granted initial refugee status. Unfortunately, according to ‘YA’, due to unrest between refugees and locals, fire in the camp destroyed his documentation and he returned to Togo to obtain a new identification and find a new safe refuge. It was thus that he boarded a plane to Paris and then to Hong Kong, arriving on 16 October 2006, with no travel documents. He was first detained on

17 October 2006 when he was refused permission to land in Hong Kong as he had no travel documents and his intention of visit was doubtful. A removal order was made against him on 1 February 2007. He was, in the circumstances, detained under different powers of detention all provided in s 32 of the Immigration Ordinance.

36. 'YA' raised his CAT claim on 25 October 2006.

37. On 5 December 2006, UNHCR informed the Director that claim of 'YA' for refugee status had been rejected both at first instance and on appeal and that it had closed his file.

38. In the meantime, 'YA' through solicitors and by himself made repeated requests to the Director of Immigration for release on recognizance, which were all refused. The Director maintained that he had considered the prospect of effecting the removal of 'YA' and his failure to provide proof or document of identity in rejecting his requests for release.

39. On 19 March 2007, 'YA' filed his application for a writ of *habeas corpus* and the writ was issued by Hartmann J on 20 March 2007. 'YA' was released by the Director on 29 March 2007 on recognizance.

40. On 2 June 2008, 'YA' was told that his CAT claim had been refused.

41. 'YA' makes general complaints that the fact of detention has made prosecution of his claim more difficult and has impeded contact

with his family overseas. But records show that he has made a number of international telephone calls in any event.

General principles

42. It is of help to set out the general principles on awarding and quantifying damages for unlawful detention or false imprisonment by a servant of the Government. For present purposes, very useful guidelines can be found in the English Court of Appeal case of *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498. The earlier decision of Patrick Chan J (as he then was) in the Vietnamese refugee case of *Pham Van Ngo v Attorney General*, HCA 4895/1990 (30 July 1993) also contains valuable discussion on the relevant principles.

43. In *Thompson*, which comprised two actions, the plaintiff in the first action suffered from false imprisonment and malicious prosecution in the hands of police officers. She claimed damages, including aggravated damages and exemplary damages. The plaintiff in the second action claimed damages against a number of police officers for wrongful arrest, false imprisonment and assault. Both actions were tried before a judge sitting with a jury. On appeal from the awards made, the Court of Appeal took the opportunity to give detailed guidelines on the additional directions that should be given in a summing up on the issue of damages for the benefit of the jury.

44. Lord Woolf MR (as he then was) began by explaining the basics and by suggesting some standard figures (pages 514 to 516):

> " (1) … Save in exceptional situations such damages are only awarded as compensation and are intended to compensate

the plaintiff for any injury or damage which he has suffered. They are not intended to punish the defendant.

(2) As the law stands at present compensatory damages are of two types. (a) Ordinary damages which we would suggest should be described as basic, and (b) aggravated damages. Aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award of aggravated damages.

(3) The jury should be told that the basic damages will depend on the circumstances and the degree of harm suffered by the plaintiff. But they should be provided with an appropriate bracket to use as a starting point. …

…

(5) In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale. …

…

(7) The figures which we have identified so far are provided to assist the Judge in determining the bracket within which the jury should be invited to place their award. We appreciate, however, that circumstances can very dramatically from case to case and that these and the subsequent figures which we provide are not intended to be applied in a mechanistic manner."

45. His Lordship then explained the possible award of aggravated damages (at page 516):

" (8) If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of

> aggravated damages should be explained to the jury. Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution.. Aggravating features can also include the way the litigation and trial are conducted. …
>
> (9) The jury should then be told that if they consider the case is one for the award of damages other than basic damages then they should usually make a separate award for each category. (This is contrary to the present practice but in our view will result in greater transparency as to the make up of the award.)
>
> (10) We consider that where it is appropriate to award aggravated damages the figure is unlikely to be less than a £1,000. We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest.
>
> (11) It should be strongly emphasised to the jury that the total figure for basic and aggravated damages should not exceed what they consider is fair compensation for the injury which the plaintiff has suffered. It should also be explained that if aggravated damages are awarded such damages, though compensatory are not intended as a punishment, will in fact contain a penal element as far as the defendant is concerned."

46. Finally, Lord Woolf turned to exemplary damages (at pages 516 to 517):

> " (12) Finally the jury should be told in a case where exemplary damages are claimed and the Judge considers that there is evidence to support such a claim, that though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary

> behaviour, by police officers which deserves the exceptional remedy of exemplary damages. It should be explained to the jury: (a) that if the jury are awarding aggravated damages these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant's point of view; (b) that exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants; (c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public (This guidance would not be appropriate if the claim were to be met by insurers); (d) that the sum awarded by way of exemplary damages should be sufficient to mark the jury's disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose.
>
> (13) Where exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent.
>
> (14) In an appropriate case the jury should also be told that even though the plaintiff succeeds on liability any improper conduct of which they find him guilty can reduce or even eliminate any award of aggravated or exemplary damages if the jury consider that this conduct caused or contributed to the behaviour complained of."

47. The earlier local case of *Pham Van Ngo* concerned four Vietnamese boat people (amongst a group of 113) who arrived in Hong Kong waters from Vietnam by a vessel, which was badly in want of repair. The majority of the boat people were intending to travel to Japan where they hoped to become refugees either permanently or for resettlement elsewhere. They accepted the offer from the Government

for food and water and repair of their vessel. It was in those circumstances that they were taken to a reception centre where they disembarked and were processed by officers of the Immigration Department. They were subsequently moved to a detention centre and they were detained until 12 November 1990 when a writ of *habeas corpus* was granted by a judge. In the meantime, the vessel was destroyed by the Government, which took the view that it was economically unviable to repair the vessel. In those circumstances, the refugees were, as it were, stuck in Hong Kong, their original hope of travelling to Japan having been dashed by the destruction of their vessel. It was held by the Court that their detention was unlawful for a technical reason. In fact, there existed alternative statutory provisions by which the refugees could have been lawfully detained in Hong Kong. The judgment of Patrick Chan J dealt with, amongst other things, their claim for damages for false imprisonment. At pages 302 to 303 of the lengthy judgment, the learned judge started with a bird's eye view of the position in relation to false imprisonment:

> " False imprisonment is of course actionable per se without proof of damage. A plaintiff is, however, always entitled to recover damages. The general principles regarding such damages are clearly set out in Halsbury's Laws of England, 4th Edition, Volume 45, paragraph 1337:
>
> > 'In an action for false imprisonment the plaintiff is entitled to recover general damages for the imprisonment. He may also recover, by way of special damages, compensation for any loss which he has incurred, although it is possible that to be recoverable such loss must be reasonably foreseeable. He may rely in aggravation of the general damages on the circumstances attending the imprisonment and on any facts in the conduct of the defendant at the time of or before or after the imprisonment which show malice.'
> >
> > In addition, 'exemplary damages may be awarded in certain circumstances'. (See Note 4 in paragraph 1337)'

> There are thus three types or heads of damages which are recoverable: first, ordinary damages which in a normal case consist of general damages and special damages; second, aggravated damages; and third, exemplary damages. Like special damages, aggravated damages and exemplary damages must be expressly pleaded. However, while special damages are almost invariably awarded as a separate item, in most cases, the court usually gives a single award of damages which is sometimes said to include an element of aggravated damages and/or exemplary damages.
>
> Both ordinary damages and aggravated damages are compensatory in nature while exemplary damages are punitive. As Lord Reid put it in Brown v Cassell & Company, [1972] 2 WLR 645 at 685G, for compensatory damages, the court must consider how much the plaintiff ought to receive whereas in assessing punitive damages, it must consider how much the defendant ought to pay. They are not necessarily the same. The factors relevant to an award of ordinary damages, aggravated damages and exemplary damages are somewhat different. For ordinary damages, the court looks at what damage has been done to the plaintiff because of the false imprisonment. For aggravated damages, the court takes into account the conduct of the defendant. As to exemplary damages, the court is to decide whether it is necessary to punish and deter the defendant. In that case the defendant's conduct is also to be looked at. Hence confusion may arise and has indeed arisen between aggravated and exemplary damages in previous cases, both prior to as well as after 1964 when the case of Rookes v Barnard [1964] AC 1129 was decided by the House of Lords."

48. The learned judge then dealt with compensatory damages first (at pp 304-305):

> " For ordinary damages, the relevant factors which the court would consider are set out in McGregor on Damages, 15th edition, paragraphs 1619 and 1620:
>
> > '… generally it is not a pecuniary loss but a loss of dignity and the like, and is left much to the jury's discretion. The principal heads of damages would appear to be injury to liberty i.e. the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status. This will all be included in the general damages which are usually

awarded in these cases: no breakdown appears in the cases.'

'In addition there may be recovery for any resultant physical injury, illness or discomfort, as where the imprisonment has a deleterious effect on the plaintiff's health. … Also damages may be given for any injury to reputation, for, as Lawrence L.J. said in Walter v Alltools, 'a false imprisonment does not merely affect a man's liberty; it also affects his reputation.''

'Any pecuniary loss which is not too remote is recoverable. Pecuniary losses fall into two categories in the cases. In the first place, that any loss of general business or employment is recoverable would seem to follow from Childs v Lewis, … In the second place, a few 19th-century cases showed that the plaintiff's costs incurred in procuring his discharge from the imprisonment may be recoverable as damages.'

Apart from these considerations, other factors such as the manner of the false imprisonment and the conduct of the defendants are also relevant as they may lead to aggravation or mitigation of the damage. Aggravating factors may call for a bigger award while on the other hand, mitigating factors may result in a reduction of the award. As for aggravated damages, the relevant considerations are as follows:

'… the court may take into account the defendant's motives, conduct and manner of commiting the tort and, where these have aggravated the plaintiff's damage by injuring his proper feelings or dignity and pride, aggravated damages may be awarded. The defendant may have acted with malevolence or spite or behaved in a high-handed, malicious, insulting or aggressive manner. The court may consider the defendant's conduct up to the conclusion of the trial, including what he or his counsel may have said at the time.' (Halsbury's Laws of England, 4th Edition, paragraph 1189)

'That case (Walter v Alltools [1944] 61 T.L.R.39), and the earlier one of Warwick v Foulkes as interpreted therein, establish that, where the false imprisonment has been brought about by the defendant preferring a charge against the plaintiff, any evidence tending to show that the defendant is preserving in the charge is evidence which may be given for the purpose of aggravating the damages. By implication, they establish the converse proposition that the defendant is entitled to give evidence in mitigation of damages tending to show that he has withdrawn the charge

> or has apologise for having made it.' (McGregor on Damages, 15th Edition, paragraph 1623)
>
> As the conduct of the defendant must be taken into account, the fact that the defendant has a reasonable and probable cause to do what he did is clearly a mitigating factor (see Warwick v Foulkes, supra). So is the defendant's bona fide relevant in assessing damages (see Rowcliffe v Murray, Larkin, and Petty (1842) CAR & M 513)."

49. His Lordship then turned to punitive damages (ie exemplary damages) at pp 305-308:

> " The main object of exemplary damages is to punish and deter the defendant. As a result of the House of Lord's decision in Rookes v Barnard, supra, exemplary damages can only be awarded in three category of cases. The one which is relevant to the present case consists of cases where there has been 'oppressive, arbitrary or [unconstitutional] action by the servants of the government'. The rationale behind this is, as Lord Devlin put it (at p.1226), that 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. Not every case which falls within this category necessarily calls for an award of exemplary damages. The court has a discretion in dealing with such award. Because of the nature of exemplary damages, such an award:
>
> > 'comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like.' (McGregor on Damages, 15th Edition, paragraph 406)
>
> As Lord Devlin in Rookes v Barnard, supra, at p.1228, said, it is only when the sum awarded as compensation (which may include ordinary as well as aggravated damages) is 'inadequate to punish (the defendant) for his outrageous conduct, to mark (the jury's or the court's) disapproval of such conduct and to deter him from repeating it' that it would be appropriate to award exemplary damages. As to the sort of conduct which may justify an award of exemplary damages, different cases have used different descriptions; 'arbitrary and outrageous', in Rookes v Barnard, supra, p.1223; 'deliberately or recklessly or with malice', in Kelly v Faulkner, [1973] Northern Ireland Law Report 31, at 43, 'wicked and callous', in Mansion v Associated Newspapers Limited, [1965] 1 WLR 1038, at 1043; 'monstrous', in Guppys (Bridport) Ltd v Brookling [1984] 14

HLR 1, at 26; 'deliberate, calculated and wilful', in AB and Others v Southwest Water Services Limited [1992] 4 All ER 574, at 584.

As I said, aggravated and exemplary damages are easily confused. However, it is important to bear in mind the different functions of these two heads of damages: the former to compensate the plaintiff and the latter to punish and deter the defendant. As the learned authors of Salmond and Heuston on Tort, 20th edition, at p.518, say, 'aggravated damages are given for conduct which shocks the plaintiff; exemplary damages for conduct which shocks the jury, and may serve the useful function of deterring others as well as punishing the defendant.' In my view, therefore, it requires a fairly high degree of 'culpability' in the defendant to merit an award of exemplary damages. Afterall, it is aimed at punishing him for such conduct as well as deterring him from repeating it.

In the cases where exemplary damages were awarded, the courts did not, usually, make separate awards. A global figure was given which was said to include ordinary, aggravated and/or exemplary damages, if any. There are a few exceptions such as Broome v Cassell and Company, supra, where a separate award for exemplary damages was made. These were jury awards which were the results of directions given by the trial judges pursuant to a remark made by Lord Devlin in Rookes v Barnard, that by doing so some costs might be saved upon a retrial. I have some reservation as to this 'practice', certainly in the case of a trial without a jury."

50. Finally, the learned judge made useful observations on the 'going rate' approach advocated by counsel (at pp 308-309):

" It was suggested to me in submission that in making an award for damages, I could use a 'going rate' for each day of false imprisonment and work out the total award. …

This submission sounds attractive but I do not think it can be sustained. It is precisely because of the differences in circumstances, both general as well as specific, pertaining to the injured parties that require individual assessment by the court and merit different awards to be made in each case. The variations in these cases may be so large that it is not only futile but dangerous to set a so-called minimum award for loss of liberty. I know of no precedent, in fact Counsel was unable to refer me to any case, in which this approach was adopted. It

> would be almost impossible to arrive at such a rate or figure at any point in time in any given case.
>
> The same reasons apply to the 'going-rate' approach. The variants are so many and divergent that any rate would not only be unreliable but may also work out to be most unfair. I notice that this had been expressly disapproved of in Kelly v Faulkner, supra. This approach was also discussed in the Lunt case, but was not accepted. I do not propose to adopt such a course in the present case."

51. It is also useful to mention *R v Governor of Brockhill Prison, Ex parte Evans (No 2)* [1999] QB 1403 (CA), which was affirmed on appeal: [2001] 2 AC 19. This case concerned a miscalculation by the prison governor of the release date of a prisoner, who as a result was released 59 days after she should have been. The Court of Appeal raised the trial judge's basic award of £2,000 to £5,000 and the House of Lords upheld the Court of Appeal's increase: [2001] 2 AC 19, 39G to 40C. Lord Woolf MR apparently accepted that in an award of damages for false imprisonment, leaving aside the question of aggravated damages and exemplary damages, there are two elements: the first being compensation for loss of liberty and the second being the damage to reputation, humiliation, shock, injury to feelings and so on which can result from the loss of liberty (p 1060A to B). What is interesting to note is that the judge went on to agree with the trial judge below that in the instant case, as a result of the period the plaintiff was lawfully imprisoned, she would have already made the necessary adjustments to serving a prison sentence. Indeed she was someone who had been properly sentenced to a term of two years' imprisonment for serious criminal offending and she had no reason to think that she was not perfectly properly incarcerated. That being the case, the judge held that the second element mentioned above, namely the damage to reputation,

humiliation, shock, injury to feelings and so on, was absent in the case (p 1060B to E).

52. Finally, Lord Woolf specifically approved the approach of the trial judge not to propose an amount for each extra day of imprisonment but rather to adopt a global approach. The Master of the Rolls recognised it would be possible to work out a daily, weekly or monthly figure from the increased award of £5,000 for the extra 59 days of wrongful imprisonment but such an exercise was discouraged (p 1060E-G). The judge emphasised that:

> "No two cases are the same. The shorter the period the larger can be the pro rata rate. The longer the period the lower the pro rata rate. The length of sentence lawfully imposed is clearly similarly significant." (p 1060G)

Summary of position in present case

53. Drawing the threads together, the position in the present case may be summarised as follows:

(1) The present case concerns claims for ordinary (basic) damages, aggravated damages and exemplary damages.

(2) As regards ordinary damages, no pecuniary or special damages are claimed. Only non-pecuniary damages are claimed.

(3) There are two elements to the claim for non-pecuniary damages, namely, first, compensation for loss of liberty; and secondly, damage to reputation, humiliation, shock, injury to feelings and so on which can result from the loss of liberty.

(4) As regards the first element, unlike the position in *Pham Van Ngo*, where there was available to the Government at all times an alternative regime whereby the Vietnamese boat people could have been lawfully detained, there was no alternative lawful procedure available to the Director or the Secretary to detain the four applicants, in the absence of a certain and accessible policy on the exercise of the powers to detain, which did not come into existence until 18 October 2008. The present case is therefore not a case of a technical breach and the assessment of damages must take into account each applicant's loss of liberty as such.

(5) The victim's quality of life or liberty, during the period of unlawful detention, must be a relevant factor to bear in mind. If the quality of liberty is anything less than full, that fact must be reflected in the assessment. Thus for the applicants, even if they had been released on their own recognizance after making the CAT claims, they would still have been persons without any legal right to stay and live permanently, or even indefinitely in Hong Kong, save to the extent that pending the verification of their CAT claims, they could not be returned to the places where, according to their claims, torture might take place. In fact, there was nothing to prevent the Government from removing them to another country or place where no apprehended torture would take place, even before the CAT claims could be verified. But other than that, the applicants would have been entitled to stay and live as free persons in Hong Kong pending the verification of their claims. These are relevant considerations to bear in mind in considering the first element.

(6) As regards the second element, namely, damage to reputation, humiliation, shock, injury to feelings and so on, both in the case of 'AS' and that of 'F', their detentions followed immediately after their release from imprisonment for offences that they were lawfully convicted of and sentenced to imprisonment for. In the case of 'AS', he had been in lawful custody since the date of his arrest (25 September 2004) until he was discharged from prison on 26 May 2005. It was a lengthy period of lawful detention. So far as he is concerned, the second element for compensation is absent or almost absent, as per *Ex parte Evans (No 2)*. As regards 'F', he had been in lawful custody since the date of his arrest on 18 April 2005 until his discharge from prison on 28 May 2005. The period of lawful detention was relatively short and the offence involved minor. I will not say that the second element is wholly absent in his case. But, as compared with the other two applicants ('A' and 'YA'), it is of reduced significance.

(7) Regarding damage to reputation, humiliation, shock, injury to feelings and so on, this must, to a substantial extent, be subjective and dependent on individuals and their particular circumstances. Thus very generally speaking, what the victim's quality or conditions of life had been prior to detention, what his expectation had been, how he perceived his detention (including its lawfulness or otherwise), how his condition of detention, as subjectively experienced by him, compared with life outside if he had not been wrongfully detained and compared with life before detention, and so forth, should be relevant considerations. But all this is not to say that there is one law for the rich and famous, and

another for those who are without. Nor can there be one measure of damages for people who came from an affluent and developed country, and another for those who arrived from a poor and under-developed place. As general propositions, they must be wrong in principle. But rejection of that does not, putting my point the other way round, prevent the court from taking the subjective and personal circumstances of the victim into account – in fact, the court should take them into account.

(8) All four applicants claim aggravated damages. Aggravated damages may be awarded where there are aggravating features about the case which result in the victim not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Conduct pertaining to the Government should therefore be taken into account. Factors such as the manner of the false imprisonment and the conduct of the wrongdoer are relevant as they may lead to aggravation or mitigation of the damages – insofar as aggravated damages (if any) is concerned.

(9) Aggravated damages is essentially compensatory in nature, but nonetheless contains also a penal element as far as the wrongful party is concerned, which may affect the question of whether exemplary damages on top of aggravated damages should be awarded and if so, the quantum of that award: *Thompson*, at pages 516 to 517, points (11) and (12).

(10) As regards exemplary damages, the law in Hong Kong, unlike some Commonwealth jurisdictions (including Australia, New Zealand and Canada), has always followed, without question, the landmark decision of *Rookes v*

Barnard [1964] AC 1129, later approved in *Broome v Cassell* [1972] AC 1027 (see also *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122): see for instance, *Wong Wai Hing v Hui Wei Lee* [2001] 1 HKLRD 736, 758H to I (CA); *霍兆榮對廉政公署* CACV 247/2002 (6 February 2003), paras 22 and 23.

(11) The first category in Lord Devlin's classification relates to 'oppressive, arbitrary or unconstitutional conduct by government servants': at p 1226. It has been said that the three epithets (oppressive, arbitrary, unconstitutional) fall to be read disjunctively: *Holden v Chief Constable of Lancashire* [1987] QB 380, 388C-D. However, it is doubtful whether conduct which is merely 'unconstitutional' (as, strictly speaking, every unlawful arrest by a police officer would be) is in itself sufficient to bring the case within the first category: see the reservations of Purchas LJ (at pages 387H to 388B) and of Sir John Arnold P at pages 388H to 389A in *Holden*. See also the Northern Ireland cases of *Clinton v Chief Constable of the Royal Ulster Constabulary* [1999] NI 215 and *Davey v Chief Constable, Royal Ulster Constabulary* [1988] NI 139.

(12) In any event, the doubt seems only to be relevant when a judge is sitting with a jury, where the question of whether a claim for exemplary damages should be withdrawn from the jury for not falling within the first category at all (assuming it is the category in question) may arise. Where the judge sits alone, such a question is likely to be academic because an award of exemplary damages does not follow automatically in every case coming within a relevant category. The Court will normally look for outrageous

conduct, disclosing malice, fraud, insolence, cruelty and the like, to justify an award for exemplary damages. *Holden* at page 389A to B/C (*per* Sir John Arnold P); *Pham Van Ngo*, *supra* at page 306; *McGregor on Damages* (17th ed) para 11-019. In the New Zealand context, where *Rookes v Barnard* is not followed and the law on exemplary damages is much more liberal, the Privy Council has held, by a majority of three to two, that in exceptional and rare cases, inadvertently negligent conduct which is so outrageous as to call for condemnation and punishment may be sufficient to justify an award of exemplary damages based on the category of negligence – which is not a recognised category for the award of exemplary damages under *Rookes v Barnard*: *A v Bottrill* [2003] 1 AC 449. The case, cited by Mr Dykes SC (Mr Hectar Pun with him) for the applicants, is of limited value in this jurisdiction for obvious reasons, but its emphasis on the rationale of the jurisdiction to award exemplary damages, namely the court's disapproval of outrageous conduct (per the majority at page 455, para 20) or the punishment of the defendant for his outrageous behaviour (per the minority at page 466, para 77) is, nonetheless, instructive.

(13) As regards actual figures, although starting figures and ceilings were suggested in *Thompson* amongst the guidelines given by the Master of the Rolls, those guidelines were meant for jury trials, and the figures mentioned were intended for the benefit of juries (as much as for judges sitting alone, of course). In the subsequent case of *Ex parte Evans (No 2), supra*, the Master of the Rolls specifically approved the trial judge's refusal to work on a daily rate but

to adopt a global approach. Any simplistic approach to use the global award to work backwards to arrive at a daily, weekly or monthly rate is bound to be erroneous because the shorter the period of false imprisonment, the larger should be the pro rata rate, whereas the longer the period, the lower the pro rata rate (*per* Lord Woolf in *Ex parte Evans (No 2)* at page 1060G). In any event, as the learned editors of *McGregor* have observed, after struggling with the various figures used by the courts in different cases, the £3,000 guideline for the first day is likely to be utilised only where the false imprisonment is very short and the suggested progressively reducing scale over the next few days should be 'steep' (para 37-008).

(14) Finally, it must be emphasised that the figures suggested or actually awarded in the English cases are not directly applicable or translatable in this jurisdiction due to differences in social and economic conditions. This has been emphasised in personal injury cases: *Lee Ting-lam v Leung Kam-ming* [1980] HKLR 657, 659; *Chan Wai-tong v Li Ping-sum* [1985] HKLR 176, 180; *Chan Pui-ki v Leung On* HKLR 401, 405-407.

(15) Rather, local awards should be looked at. However, it cannot be overemphasised that no two cases are the same. Moreover, even in comparable cases, one would still have to be satisfied that the previous award was appropriate and right. It is wrong to use past cases – even local ones – as if they contained figures set by statutes. Nor do they act as any strict jacket. Their real use, particularly when considered collectively, is to provide the Court with a general 'feel' of the appropriate amount of award in the case

> at hand and to act as a cross-check against any significant departure, one way or the other, from the previous awards, or, where it can be observed, the prevailing trend of awards. To a much lesser extent, general levels of awards made in personal injury cases may also be looked at to serve as a very rough and general cross-check. This has in fact been mentioned by Lord Woolf in *Thompson*, at page 515E, point (5).

Observations on past Hong Kong cases

54. Mr Anderson Chow SC for the Director has very helpfully prepared, together his junior, Ms Grace Chow, a summary, in the form of a table, of relevant local cases on false imprisonment and malicious prosecution, for general comparison purposes. It has been liberally used by counsel on both sides as well as the Court during argument. I have, gratefully, taken the liberty to reproduce the table as an annex to this judgment. I would, where appropriate, make observations on these past cases, bearing in mind what I have just said about the use of previous cases in the present assessment.

55. *Faridha* (2007) is of very peculiar facts. The Indonesian domestic helper was subjected to hitting, pinching, scratching and assault with objects by her employer. She was falsely imprisoned in her employer's home, made to sleep on the kitchen floor and had to work long hours for a prolonged period of four months. The award of $60,000 included aggravated damages. The facts in that case were, in short, appalling.

56. *Godagan* (2004) has to be read with care. The award of $200,000 was not primarily for false imprisonment – the plaintiff having spent 19 days in prison, but rather for malicious prosecution which lasted almost a year, involving an initial conviction and the overturning of the conviction on appeal. The judge acknowledged that there were no relevant comparables in Hong Kong, and after referring to the benchmark figures in *Thompson*, came to the view that $200,000 was the appropriate figure (paras 89 to 91).

57. *馬桂珍 (Ma Kwai Chun)* (2003) involved unlawful detention for 12 hours. The judge did not find the two cases, both concerning assault by police officers, cited by the parties to be useful (paras 19 to 21). Apparently, the Court was affected by the award made by the Court of Appeal in *霍兆榮對廉政公署, supra*, which concerned the wrongful handcuffing and photographing of the plaintiff by the ICAC, where the Court of Appeal awarded damages of $10,000 for loss of dignity (paras 22 and 23). The judge felt that the plaintiff should get $50,000 for the 12 hours of wrongful detention that she had experienced in terms of her loss of dignity and injury to her feelings (para 25). On top, the judge gave $30,000 for aggravated damages to account not only for the absence of any apology, but the way the police had maintained, quite without justification, the lawfulness of the wrongful arrest of the plaintiff in the proceedings (para 28). In my view, the awards made by the judge were justified on the peculiar facts of that case. It, perhaps, provides an illustration that for a very short period of false imprisonment, the award can be, relatively speaking, substantial, whilst for any further period of unlawful detention, the progressively reducing scale should be very steep.

58. I do not find the awards made in *Pham Van Ngo* (1993) to be on the low side, as was suggested by Mr Hectar Pun, following Mr Dykes, in his submission on the local cases. The Court there was dealing only with the second element of the award for ordinary damages, it having held that there were all along available alternative provisions whereby the Government could have made use of to detain lawfully the boat people. Furthermore, at the risk of repeating: it is not appropriate to simply compare the award in a case where the period of false imprisonment is very short with a case where the period goes to many months or years, by reason of the progressively reducing scale. Put another way, the longer the period of detention, the less significant the second element for the award of ordinary damages would become after the initial period of detention; and the sole or major factor determining the amount of award in such prolonged situation would be the first element, namely the loss of liberty. *Pham Van Ngo*, involving a substantial period of false imprisonment of about 18 months, was wholly concerned with the second element.

59. Likewise, the case of *William Crawley* (1986), involving a very short period of unlawful detention (2.5 hours), should be understood in that light.

60. *Yoo Soon-nam* (1976) contains *obiter* observations on the award of damages if liability had been established. The figure suggested, inclusive of exemplary damages, of $40,000, back in 1976, for a technical breach (pages 718 to 719) involving under 56 hours of wrongful detention, would seem to be on the high side, even bearing in mind that one was concerned with a very short period of false imprisonment. It

was quite out of line with the figures in other earlier cases summarised in the table. In any event, I have reservations as to whether exemplary damages should be awarded at all, given that apart from the conduct being 'unconstitutional', there seems to have been an absence of any conduct which was outrageous or deserving of punishment.

61. Considering that *Chong Yee Shuen* was a case decided back in September 1974, the award of $3,000 for three days false imprisonment seems understandable enough. In comparison with *Yoo Soon-nam*, I very much prefer *Chong Yee Shuen*, which were decided within two years of each other.

62. Finally, *Chow Hau Yung* (1970) confirmed the general level of award as evidenced by *Chong Yee Shuen*. $7,000 was awarded for five hours unlawful detention, following a wrongful arrest that was accompanied by assault and threats made by police officers during detention. Again the case, decided in February 1970, tends to confirm my view that the *obiter* figure suggested in *Yoo Soon-nam* was very much on the high side.

Six specific matters raised by the respondents

63. Mr Chow has urged upon the Court a total of six factors which are said to be relevant to the award of ordinary damages, as well as the question of whether aggravated or exemplary damages should be awarded on top.

64. First, the applicants' own conduct in causing or substantially contributing to their detention. Counsel's point is essentially that save

for the case of 'YA', the other three applicants all have committed criminal acts – overstaying, going underground, absconding, transferring to another a travel document, and making a false representation to an immigration officer. They constituted circumstances pointing to there being high risks of absconding and/or re-offending, which were reasons for their detention by the Director and Secretary. Mr Chow has pointed out, by way of comparison, that in the majority of cases concerning CAT claimants, they were released on recognizance.

65. I accept that so far as the award for ordinary damages is concerned, the factor mentioned could be relevant to the second element. The more 'meritorious', as it were, the detention – albeit unlawful for a procedural/institutional flaw, the less grievance the victim may have felt towards his unlawful detention. But there is a limit to how far this factor can affect the final figure.

66. I also accept that this is a matter that can be and in fact should be taken into account in relation to aggravated damages as well as exemplary damages.

67. It has to be pointed out that although there was at the time no accessible policy on how the discretion to detain would be exercised, so that in terms of art 5(1) of the Hong Kong Bill of Rights, the detentions were 'arbitrary', it does not necessarily follow that viewed in light of the individual merits of each case, the detention was capricious or 'arbitrary' in the general public law sense. On the evidence, there were materials and evidence which tend to justify the Director's or Secretary's decisions, at the level of individual merits, to detain the applicants.

68. On the facts, I think the case of 'AS' was plainly poor, whereas that of 'A' and 'F' were relatively better and indeed similar. Both were overstayers, the only difference being that 'F' was actually prosecuted and convicted and sentenced to a short term of imprisonment. I do not accept Mr Chow's argument in relation to 'YA'. He came to Hong Kong using an air ticket and boarding pass bearing someone else's name and he failed to provide a travel document or other satisfactory documents. But bearing in mind that 'YA' was claiming to be a possible target of torture, those facts were by no means out of the ordinary. While I do not suggest that his detention must, even at the level of individual merits, be flawed, so far as the present discussion is concerned, I do not think the circumstances of his case would have much impact on the level of damages that should be awarded to him.

69. With the exception of 'YA', the three other applicants all made their CAT claims very late in the day. That could, arguably, reflect on whether they really had a genuine claim. That certainly contributed to the suspicion that the Secretary or Director had regarding the merits of their claims even before their eventual rejection. But so far as the question of ordinary damages and the second element are concerned, I think this is of very marginal relevance only.

70. Secondly, Mr Chow says that the Director or Secretary had reasonable and probable cause to detain the applicants and acted *bona fide*. I have no doubt that they are matters relevant to a consideration of aggravated damages and exemplary damages. So far as they are mirror images of the first point already discussed, I accept they are relevant to ordinary damages as well. Beyond that, I do not see how the Director's

perception of the situation could be relevant to the quantification of the ordinary damages due to the wronged applicants. It is not relevant to either of the two elements comprising the award for ordinary damages. Moreover, as I have emphasised, so far as the second element is concerned, it is the subjective perception of the applicant which really matters (provided that this is kept within bounds). The Director's or Secretary's own perception of his action is quite irrelevant.

71. Thirdly, Mr Chow points to the fact that all four applicants had already been held in detention prior to the commencement of the periods of unlawful detention. I have already discussed this factor earlier on. It is based on *Ex parte Evans (No 2)*, which involved a victim who had served two years' imprisonment for a serious crime. Of the four applicants in the present case, the case of 'AS' would be seriously affected by the principle under discussion. To a much less extent, the case of 'F' would also be affected.

72. Fourthly, Mr Chow has urged the Court to take into account the previous living conditions of the applicants. I have already dealt with this point and do not intend to repeat myself. As I say, given the subjective element built into the second element comprising the award for ordinary damages, the personal circumstances of the applicants must be taken into account, including their previous living conditions. But as I have also stressed, there is a limit to it and these circumstances can only be of limited relevance.

73. Fifthly, Mr Chow says that the applicants had no legal rights to work in Hong Kong. This is a quality-of-liberty argument. It is

relevant, as a matter of principle, to the first element comprising the award for ordinary damages. However, the right to work, as a matter of strict law and as a matter of what would actually have happened if there had been no unlawful detentions and the applicants had been released on recognizance, is not a straightforward matter: see *Iqbal Shahid v Secretary for Justice*, HCAL 150/2008 & 8/2009, 30 December 2008 (leave application) & 2 March 2009 (substantive hearing), Wright J. I place negligible weight on this matter in the assessment.

74. Sixthly, Mr Chow relies on the conditions in which the applicants were detained. He says, by reference to the evidence, that the applicants were allowed to make telephone calls, subject to following certain procedures and subject to an undertaking to pay the necessary charges for international calls. Newspapers were provided to the detainees, as were reading materials. They were provided with adequate medical treatments where required. There is no objective medical evidence that any of the applicants has suffered any physical or (permanent) psychological injury as a result of the detention. Nor is there any evidence that they were not well treated. I accept all this is relevant.

75. On the other hand, I bear in mind that the applicants have been treated as remanded prisoners, and a relevant fact is that their life in prison lacked the structure and the direction of the regime that governs convicted prisoners that requires them to work and allows them to access vocational and educational opportunities to make them better adjusted to return to civil society. This fact assumes significance when the detention becomes prolonged.

Several other matters

76. I move on to deal with several matters raised in general. First, as regards aggravated damages, Mr Dykes submits that the applicants were CAT claimants expecting protection and a fair procedure for determining their claims, and their detention caused them upset simply because it was arbitrary. It would be frustrating in the extreme for a person to see a similarly circumstanced CAT claimant not being detained. Counsel stresses that it is different from the fact that the lack of a detention policy amounted to institutional indifference, a factor which may engage the jurisdiction to award exemplary damages (see below).

77. The second point made by Mr Dykes in support of the claim for aggravated damages is the lack of any apology for the wrongful detention.

78. As regards the first point, I take the view that as a matter of principle, it is a valid point. However, as a matter of fact, I do not think that in the cases of 'A', 'AS' and 'F', they had good grounds for complaint, on the merits of their respective cases. This is particularly so in the case of 'AS', who had been convicted of offences and who had served a substantial period of imprisonment. Detaining him on the ground of risk of absconding or re-offending was understandable – although unlawful due to the procedural/institutional flaw. To a lesser extent, 'A' and 'F' could not complain, they having gone underground as overstayers for very substantial periods of time. The case of 'YA' was more marginal and I agree that he may have felt upset at his detention. He made his CAT claim shortly after arrival, and he was effectively

detained since arrival until after proceedings were commenced. On the other hand, I bear in mind that his identity had not been verified. That would go some way towards justifying the Director's detention of him.

79. As regards the absence of an apology, I do not think in itself it is a sufficient ground for the award of aggravated damages. This has been so held by Patrick Chan J in *Pham Van Ngo, supra*, at pages 322-323 (on the facts of that case) and the same point was made by Chung J in *馬桂珍, supra*, at para 28.

80. But certainly, it is a matter that should be taken into account.

81. Secondly, as regards exemplary damages, Mr Dykes submits that the detentions were 'oppressive', taking into account the status of the applicants as torture claimants. He contends that detention is never necessary simply because someone is a CAT claimant and, in the absence of fast track procedures detention can impede the investigation and processing of a claim. Mr Dykes concedes that 'AS' and 'F' stand in a different category because of their past convictions.

82. Mr Dykes also submits that the detentions were 'arbitrary' given the failure to comply with art 5(1) of the Hong Kong Bill of Rights.

83. Mr Dykes further submits that the detention in each case was 'unconstitutional' because it contravened art 39 of the Basic Law and art 5(1) of the Hong Kong Bill of Rights.

84. Mr Dykes complains about the institutional neglect on the part of the authorities to put in place a published and accessible policy on detention. This, it is said, justifies the award of exemplary damages.

85. Whilst conceding that no malice or bad faith was involved, Mr Dykes also makes the point that the absence of a policy or a published and accessible policy in the present case meant that the authorities were guilty of such 'inadvertently negligent conduct' which was so outrageous as to call for condemnation and punishment, bearing in mind the background that back in *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, the Court of Final Appeal had already said that the Government had a duty to put in place fair and proper procedures to screen the claims of torture claimants. Counsel based his submission on the Privy Council case of *A v Bottrill, supra*.

86. For the reasons already explained, I do not think that in the cases of 'A', 'AS' and 'F', anything oppressive had happened. At the level of individual merits, their respective detentions were all understandable, albeit wrong. In the case of 'YA', it was more marginal, but nonetheless, I would hesitate to apply the label 'oppressive' to his case. The fact that a detention may not even be justifiable under general public law (I am not suggesting that this must have been the case here) does not necessarily turn it into one that is oppressive.

87. The same comments apply to the submission based on arbitrariness, save that again, in the case of 'YA', it is slightly more arguable (I put it no higher than that) that his detention was doubly arbitrary – for want of compliance with art 5(1) of the Hong Kong Bill of

Rights and for lack of objectively justifiable grounds even under general public law.

88. The detentions were no doubt unconstitutional, strictly speaking. But I have already discussed this element in Lord Devlin's first category above. In my view, that, *per se*, is quite insufficient to trigger an *actual* award for exemplary damages (as opposed to leaving the question to the jury), in the absence of outrageous conduct, disclosing malice, fraud, insolence, cruelty and the like. This brings one back to the other arguments raised.

89. As regards the supposed disregard of the Court of Final Appeal's admonition that a fair and proper procedure to verify CAT claims should be put in place, I take the view that detention and screening of CAT claimants belong to two separate regimes, though there is some intersection. The power to detain may be exercised in a variety of circumstances, many of which may have nothing to do with torture claimants. I do not regard the failure of the Director or Secretary to have a published and accessible policy in itself a wilful disregard of the view of the Court of Final Appeal in *Prabakar* expressed in relation to CAT claimants.

90. Finally, the marriage plan of 'A' was affected by his detention. The loss should be covered by the award for ordinary damages: *R (Hall) v The Independent Assessor* [2008] EWHC 2758 (admin).

91. Having dealt with these specific matters, I now move on to quantify the damages payable to the individual applicants.

Assessment – 'A'

92. In the case of 'A', the period of detention was three months. I have firmly borne in mind the personal circumstances of 'A', including the detention's effect on his intending marriage. I have not forgotten his hunger strike whilst being detained. There was also a suggestion that he suffered from some depression during imprisonment, for which he had received treatment. I have borne all this in mind, which should be reflected in the award for ordinary damages.

93. I have also taken into account all the matters discussed above, insofar as they are relevant to his case.

94. For ordinary damages, I would award $80,000.

95. I do not think a case for aggravated damages or exemplary damages has been made out.

96. In particular, in relation to exemplary damages, I do not find any outrageous conduct, disclosing malice, fraud, insolence, cruelty and the like, in the present case. I specifically reject Mr Dykes' argument that inadvertently negligent conduct is sufficient, on the facts of the present case, particularly bearing in mind that *A v Bottrill* was an appeal from New Zealand, where the law is different.

Assessment - 'AS'

97. In the case of 'AS', the period of wrongful detention was lengthy. It comprised a period of 655 days, or some 21.5 months.

98. I have also firmly borne in mind the personal circumstances peculiar to 'AS'. Everything I have said above, insofar as it applies to 'AS', has been taken into account. Two specific points are worth repeating in the case of 'AS'. First, the period of wrongful detention was preceded by a substantial period of imprisonment for conviction of offences. Secondly, so far as the individual 'merit' of his case was concerned, it was very poor and there were more than sufficient reasons to detain him (but for the procedural/institutional flaw). In other words, the second element for awarding ordinary damages plays a very minor if not negligible role in his case.

99. For ordinary damages I would award $150,000.

100. For similar reasons, I do not think a case for the award of aggravated or exemplary damages has been made out.

Assessment – 'F'

101. Turning to the case of 'F', his personal circumstances have been firmly borne in mind. Everything said above, insofar as it is applicable to his case, has been taken into account. I have borne in mind his hunger strike. His period of wrongful detention was likewise lengthy. It comprised 634 days, or over 20.5 months. The period of wrongful detention was preceded also by a period of lawful imprisonment.

However, the offence involved was relatively minor and the sentence short. As explained, the second element for the award of ordinary damages has a reduced, but nonetheless some, effect here.

102. There were complaints regarding the conditions of 'F' during detention. However, according to the available immigration record, 'F' did receive medical treatment for hypertension and it was medically confirmed that appropriate treatments had been rendered to him and his general health condition had been satisfactory during his detention.

103. Taking everything into account, I think an award of $180,000 for ordinary damages is fair.

104. Again, I do not think a case for aggravated damages or exemplary damages has been made out.

Assessment – 'YA'

105. Finally, as regards the case of 'YA', his personal circumstances have been taken into account. I have not forgotten his hunger strike and the alleged difficulties of communicating with his family back home. His detention involved a period of 156 days, or over five months.

106. In my view, an appropriate award for ordinary damages is $100,000.

107. I do feel there is a marginal case for the award of aggravated damages, for the reasons explained above. However, such an additional award is only made if one finds that the award for basic damages is not sufficient to cover the matters that might otherwise justify the making of an additional award. The making of such an additional award is the exception, rather than the rule.

108. In the present case, all things considered, I find the award of $100,000 to be quite sufficient as compensation for everything that 'YA' has gone through, and I decline, therefore, to make an additional award of aggravated damages or exemplary damages.

Comparison and crosschecking

109. I wish to say specifically that in making the above awards, I have borne in mind the levels of awards in previous cases, insofar as they are useful and insofar as the Court agrees with the awards made in those cases. But as I said, they do not provide any strict jacket.

110. The Court has also borne in mind, very generally and roughly, the levels of awards made in personal injury cases, particularly the awards for pain, suffering and loss of amenities under the four categories of loss: *Lee Ting-lam v Leung Kam-ming* [1980] HKLR 657. For a case falling within the bottom end of the serious injury category, such as the loss of a limb replaced by a satisfactory artificial device (see p 659), the current level of award would be in the region of $460,000 to $500,000: see for example, *Chui Kam Sang v Tao Kee Eng Co Ltd* HCPI 986/2006, 21 July 2008 (Recorder J Fok SC), paras 53-60; *Wong Tsan Ming v Tse Chi Man* HCPI 73/2008, 25 August 2008 (Master Levy)

paras 131-134. As a further comparison, the statutory award for bereavement in a fatal accident case is $150,000 (this has remained the figure since 1997): The Fatal Accidents Ordinance (Cap 22), s 4(3).

Rejection of simple arithmetical approach

111. For the reasons explained, I reject Mr Pun's submission on the quantification of the applicants' claims which is essentially based on daily rates, proportions and straight-line computations. As has been mentioned more than once, a global approach is to be preferred to a rateable approach, and in any event, so far as daily, weekly or monthly rates are concerned, these pro rata rates are on a progressively sliding scale. Applying percentages of discount to the award for ordinary damages to arrive at figures for aggravated and exemplary damages is not justified by a careful reading of the authorities, and is in any event artificial. Ignoring these principles have resulted in counsel's figures being, with respect, wide off the marks.

Outcome

112. Damages payable to 'A', 'AS', 'F' and 'YA' are assessed at $80,000, $150,000, $180,000 and $100,000 respectively.

113. Unlike a personal injury claim, no pre-assessment interest is in question: *Holtham v The Commissioner of Police for the Metropolis* (CA) (unrep) 25 November 1987.

114. Post-assessment interests will of course follow the judgment rate.

115. As regard costs, I make a costs order *nisi* that the costs of the assessment be paid by the respondent to the applicant in each case, to be taxed if not agreed. The applicants' own costs are to be taxed in accordance with legal aid regulations.

116. I thank counsel for their assistance.

(Andrew Cheung)
Judge of the Court of First Instance
High Court

Mr Philip Dykes SC and Mr Hectar Pun, instructed by Barnes & Daly, for the applicants in all four cases

Mr Anderson Chow SC and Ms Grace Chow, instructed by the Department of Justice, for the respondent

Annex

Table of Hong Kong cases on false imprisonment/malicious prosecution

Case	Date	Facts	Length of unlawful detention	General damages	Aggravated damages	Exemplary damages
Faridha Sulistyoningsih v Mak Oi Ling Karen, DCPI 1575/2005 (Unrep)	4/4/07	Physical abuse (hitting, pinching, scratching and assault with objects) and false imprisonment of Indonesian domestic helper who had just arrived in Hong Kong. She slept on the kitchen floor, was not allowed to go out and worked very long hours.	Around 4 months	$60,000 (false imprisonment including aggravated damages)		nil
Godagan Denivalage Prema C v Cheung Kwan Fong and Anor, DCCJ 2488/2003 (Unrep)	20/12/04	Plaintiff was a domestic helper falsely accused of theft of a pair of shoes. Conviction was overturned on appeal.	19 days in prison and almost a year before acquitted	$200,000 (malicious prosecution)	nil	nil
馬桂珍v 香港警務處長曾蔭培, HCA 3983/2001 (Unrep)	13/6/03	Plaintiff was arrested without proper basis and unlawfully detained.	12 hours	$50,000	$30,000	nil
Pham Van Ngo and Others v AG, HCA 4895/1990 (Unrep)	30/7/93	Vietnamese refugees were detained at the detention centre pending the screening of their	About 18 months	$30,000 $30,000 $50,000	nil	nil

Case	Date	Facts	Length of unlawful detention	General damages	Aggravated damages	Exemplary damages
		refugee claims. Of the 7 sample plaintiffs, 5 were adults and 2 were young children.		$50,000 $15,000 $100		
William Crawley v AG [1987] HKLR 379	13/11/86	Arrested pursuant to a bench warrant and detained at a waiting cell at the police station for 20 minutes before taking him to the Magistrate, handcuffed, without justification for doing so.	2.5 hours	$4,500	nil	nil
Yoo Soon-nam v AG [1976] HKLR 702	6/8/76	The plaintiff claimed that she was wrongfully detained by immigration officers on suspicion that she entered HK illegally. The court held that her detention was lawful but had there been unlawful detention it would have been both unconstitutional and oppressive to justify exemplary damages. Yet having regard to the fact that the plaintiff could have been detained up to 7 days and the officers believed they were acting lawfully, there could be mitigation in damages.	Just under 56 hours	$40,000 (would have been awarded inclusive of exemplary damages)		

Case	Date	Facts	Length of unlawful detention	General damages	Aggravated damages	Exemplary damages
Chong Yee Shuen v AG [2001] 3 HKC 745	23/9/74	Plaintiff was ordered to be removed and detained pending his removal. He was later released on recognizance. The removal and detention order was admitted to be of no effect being signed by the Deputy Colonial Secretary instead of by the Governor or the Colonial Secretary.	3 days	$3,000	nil	nil
Chow Hau Yung v Pang Chun Ying [1946-1972] HKC 322	5/2/70	The plaintiff was suspected of having taken part in a fight and was arrested without evidence and detained at the police station where he was assaulted and threatened by the police officers during interrogation. He was later released without charge.	5 hours	$7,000	nil	nil