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CACV 314/2007 & CACV 315/2007 &
CACV 316/2007 & CACV 317/2007

CACV 314/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 314 OF 2007

(ON APPEAL FROM HCAL NO. 100 OF 2006)

BETWEEN

‘A’ Applicant

and

DIRECTOR OF IMMIGRATION Respondent

AND

CACV 315/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 315 OF 2007

(ON APPEAL FROM HCAL NO. 11 OF 2007)

BETWEEN

‘F’ Applicant

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and

DIRECTOR OF IMMIGRATION Respondent

AND

CACV 316/2007

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

CIVIL APPEAL NO. 316 OF 2007
(ON APPEAL FROM HCAL NO. 10 OF 2007)

BETWEEN

‘AS’ Applicant

and

DIRECTOR OF IMMIGRATION Respondent

AND

CACV 317/2007

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

CIVIL APPEAL NO. 317 OF 2007
(ON APPEAL FROM HCAL NO. 28 OF 2007)

BETWEEN

'YA' Applicant

and

DIRECTOR OF IMMIGRATION Respondent

(HEARD TOGETHER)

Before: Hon Tang VP, A Cheung J and Barma J in Court
Date of Hearing: 17 June 2008
Date of Judgment: 18 July 2008

J U D G M E N T

Hon Tang VP (giving the judgment of the Court):

Introduction

1. The 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention") applies to Hong Kong.

2. Article 3.1 of the Convention states:

> "1. No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

3. The Secretary for Security ("the Secretary") has adopted the policy of not deporting or removing a person to a country where that person's claim that he would be subjected to torture in that country was considered to be well-founded.

4. In *Secretary for Security v Sakthevel Prabakar* [2004] 7 HKCFAR 187, the Secretary accepted that the determination of a claim made under the Convention must be made fairly. The Chief Justice said:

> "45. It is for the Secretary to make such a determination. The courts should not usurp that official's responsibility. But having regard to the gravity of what is at stake, the courts will on judicial review subject the Secretary's determination to rigorous examination and anxious scrutiny to ensure that the required high standards of fairness have been met. *R v Home Secretary, Ex P Bugdaycay* [1987] 1 AC 514 at 531 E-G. If the courts decide that they have not been met, the determination will be held to have been made unlawfully."

5. In this appeal, each of the 4 applicants has made a claim under the Convention. Their claims have been rejected by the Secretary. The Secretary has taken about 8, 15, 17 and 22 months respectively to complete the assessment of the applicants' claims. We are not concerned with the correctness of the Secretary's decision, which is the subject of challenge in separate proceedings. We are concerned with the power of detention under the Immigration Ordinance, Cap.115 ("the Ordinance"), after the making of the claims. The applicants' contention that their detention was unlawful is the subject of the present proceedings.

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Background

6. The applicant 'A', an Algerian, and 'F', a Sri Lankan, were the subject of removal orders made under section 19(1)(b) of the Ordinance dated 15 June 2006 and 30 June 2005 respectively. 'A' made a convention claim on 14 June 2006. 'A' was granted leave to apply for judicial review on 13 September 2006. On the same day, he was granted bail by Hartmann J. 'F' made a convention claim on 5 July 2005. 'F' was granted leave to apply for judicial review on 5 February 2007.

7. 'AS' was the subject of a deportation order made by the Secretary made under section 20(1)(a) of the Ordinance dated 23 May 2005. 'AS' made a convention claim on 14 June 2005. 'AS' obtained leave to apply for judicial review on 5 February 2007.

8. 'YA' was refused admission into Hong Kong on arrival from Paris on 16 October 2006. He is from Togo, West Africa. He made a convention claim on 25 October 2006. A removal order was made against him under section 19(1)(b) on 1 February 2007. He applied for a writ of habeas corpus on 19 March 2007, and the writ was issued by Hartmann J on 20 March 2007. He was released on recognizance on 29 March 2007.

9. Shortly before the hearing, both 'AS' and 'F' were released on their recognizance.

Power to detain

10. The power to detain was conferred by section 32 of the Ordinance. Section 32(3) and 32(3A) are relevant. They provide:

> "(3) A person in respect of whom a removal order under section 19(1)(a) or a deportation order is in force may be detained under the authority of the Secretary for Security pending his removal from Hong Kong under section 25.
>
> (3A) 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 of Immigration, the Deputy Director of Immigration or any assistant director of immigration pending his removal from Hong Kong under section 25."

11. Before a person could be detained under section 32 there must first be a removal order under section 19(1)(a) or section 19(1)(b), or a deportation order made under section 20. Furthermore the person could be only detained *pending* his removal from Hong Kong under section 25.

12. Section 19 provides:

> "19. Power to order removal
>
> (1) A removal order may be made against a person requiring him to leave Hong Kong-
>
> (a) by the Governor if it appears to him that that person is an undesirable immigrant who has not been ordinarily resident in Hong Kong for 3 years or more; or
>
> (b) by the Director if it appears to him that that person-
>
> (i) might have been removed from Hong Kong under section 18(1) if the time limited by section 18(2) had not passed; or
>
> (ii) has (whether before or after commencement of the Immigration (Amendment) (No. 4)

Ordinance 1981 (75 of 1981)) landed in Hong Kong unlawfully or is contravening or has contravened a condition of stay in respect of him; or

(iia) not being a person who enjoys the right of abode in Hong Kong, or has the right to land in Hong Kong by virtue of section 2AAA, has contravened section 42; or

(iii) being a person who by virtue of section 7(2) may not remain in Hong Kong without the permission of an immigration officer or immigration assistant, has remained in Hong Kong without such permission.

(2) (Repealed 31 of 1987 s. 16)

(3) (Repealed 88 of 1997 s. 9)

(4) A removal order made against a person shall invalidate any permission or authority to land or remain in Hong Kong given to that person before the order is made or while it is in force."

13. As noted, 'AS' was the subject of a deportation order made under section 20 by the Chief Executive. Under section 20(5):

"(5) A deportation order shall require the person against whom it is made to leave Hong Kong and shall prohibit him from being in Hong Kong at any time thereafter or during such period as may be specified in the order."

14. Section 25 provides:

"(1) A person in respect of whom a removal order or a deportation order is in force may be removed from Hong Kong in accordance with this section.

(2) The Director may give directions-

(a) to the captain of any ship or aircraft about to leave Hong Kong requiring him to remove such person from Hong Kong to a specified country;

> (b) to the owners or agents of any ship or aircraft requiring them to make arrangements for the removal of such person from Hong Kong in a ship or aircraft specified or indicated in the directions to any such country.
>
> (3) A person in respect of whom directions are given under subsection (2) may be placed under the authority of an immigration officer, immigration assistant or police officer on board any ship or aircraft in which he is to be removed in accordance with the directions.
>
> (4) A person in respect of whom a removal order or a deportation order is in force may be removed by land to a specified country, and for that purpose may be taken in the custody of an immigration officer, immigration assistant or police officer to the place at which he is to be removed."

Article 5 of Hong Kong Bill of Rights ("HKBOR")

15. Mr Dykes, SC for the applicants, relied on the following paragraphs in Article 5 of HKBOR:

> "(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> ……
>
> (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

16. Under Article 5(1), the detention must not be arbitrary, and it must be on such grounds and in accordance with such procedure as are established by law. They are separate requirements. The expressions

"prescribed by law", "established by law", "according to law" or similar expressions mandate the principle of legal certainty and the requirement of accessibility. *Shum Kwok-sher v HKSAR* [2002] 5 HKCFAR 381.

17. A double test is applied:

> "The detention impugned must be lawful under domestic law, and the domestic law must be in compliance with the [European Convention for the Protection of Human Rights and Fundamental Freedoms 1950] both substantively and procedurally."

per Brooke LJ in *D & Others v Home Office* [2006] 1 All ER 183, a decision of the English Court of Appeal on the European equivalent of Article 5 of BORO.

The Appeal

18. On 15 June 2007, Hartmann J dismissed all the applications, holding that the detention was lawful under domestic law and complaint with Article 5 of HKBOR. This is the applicants' appeal. However, the issue whether the *full* period of the detention was or was not lawful was left to be adjudicated separately. That has since been dealt with by the learned judge who has reserved judgment. We are not concerned with this question.

19. The applicants are represented by Mr Philip Dykes, SC, Mr Hectar Pun and Ms Ho Wai Yang. The respondent is represented by Mr Anderson Chow, SC, and Ms Grace Chow.

Legality under Domestic Law

The making of the section 19 or section 20 orders

20. Mr Dyke submitted that given the Secretary's policy not to remove the applicants to the state in which there was an outstanding claim under the Convention, the Secretary was not entitled under the Ordinance to order the removal or deportation of the applicants.

21. We agree with Mr Chow that while the making of a removal or deportation order (We use the two interchangeably) has the immediate effect of requiring the person who is subject to the order to leave Hong Kong, it does not require that person to go to any particular country. Nor does it oblige the Director of Immigration ("the Director") to immediately send that person to any particular country.

22. When the person fails or refuses to leave voluntarily, the Director may take steps to effect his removal in accordance with section 25. This involves another statutory discretion, which has to be exercised in light of all relevant surrounding circumstances including the appropriateness, feasibility and practicality of the steps proposed to be taken. An individual could be removed to a specified country which is defined in the Ordinance to mean:

> "… a country or territory-
>
> (a) of which a person who is to be removed from Hong Kong is a national or a citizen;
>
> (b) in which that person has obtained a travel document;
>
> (c) in which that person embarked for Hong Kong; or

> (d) to which an immigration officer or immigration assistant has reason to believe that that person will be admitted;"

23. There is nothing in the Ordinance which requires the Director to bring about immediate removal under section 25. Nor does it follow the person would be sent to the state in respect of which he has made a convention claim. The making of a convention claim only means that the individual cannot be returned to the particular state in relation to which he has made the claim.

24. Mr Dykes submitted that unless removal could be effected within a reasonable time, no removal order could or should be made. He pointed to the fact that the making of a removal order may expose the person to criminal prosecution for overstaying in Hong Kong. The supposed risk of prosecution is unreal. So long as removal remains a real possibility, I can see no reason why a removal order should not be made.

25. As the learned judge said the Ordinance clearly contemplates that it may not be possible to bring about immediate physical removal. For example, under section 36, the person may be released on recognizance. Under section 34, the deportation order may be suspended. Under section 19(5), a person who is served with a removal order may appeal that order and may not be removed until all rights in that regard have been exhausted. There is also the possibility of judicial review, the resolution of which may take a considerable period of time. Thus, the removal order may trigger lengthy proceedings with the result that the person will not be removed for a considerable length of time. It is illogical to say that the lengthy proceedings which may be triggered by the removal order could in turn

affect the power to make the removal order in the first place. By the same token, the validity of a removal order cannot be affected by the subsequent making of a convention claim.

Detention pending removal

26. Under section 32, a person may be detained *pending* his removal from Hong Kong under section 25.

27. The leading authority on the power to detain pending removal is *R v Governor of Durham Prison, Ex parte Hardial Singh* [1984] 1 WLR 704, a decision of Woolf J (as he then was), which was concerned with the power to detain pending removal under the Immigration Act 1971. There Woolf J said:

> "… Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

28. *Hardial Singh* has been approved by the Privy Council in *Tan Le Lam v Tai A Chau Detention Centre* [1997] AC 97, on appeal from Hong Kong concerning the power to detain a Vietnamese migrant pending his removal from Hong Kong under the Ordinance.

29. As the Chief Justice has explained in *Thang Thieu-quyen v Director of Immigration* [1997] 1 HKCFAR 167 at 188:

> "The relevant power in section 32(1)(a) to detain a person to be removed from Hong Kong is expressed as a power to detain 'until he is so removed'. The power is not specifically limited to 'for the purpose of removal', let alone 'for the purpose of immediate removal'. No doubt the Ordinance contemplates that a removal, pursuant to an order, will be effected in a reasonable time. What is reasonable will again depend upon the circumstances of the particular case."

30. In *R (Khadir) v Home Secretary* [2006] 1 AC 207, Lord Brown of Eaton-under-Heywood said in a similar context:

> "32 The true position in my judgment is this. 'Pending' in paragraph 16 means no more than 'until'. The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be 'pending', still less that it must be 'impending'. So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (i e throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains 'liable to detention' and the ameliorating possibility of his temporary admission in lieu of detention arises under paragraph 21."

31. We agree with Mr Chow that these authorities show that so long as the Secretary is intent upon removing the applicant at the earliest possible moment, and it is not apparent to the Secretary that the removal

within a reasonable time would be impossible, the power to detain pending removal is in principle still exercisable.

32. As Lord Brown said in *Khadir*:

> "33 To my mind the *Hardial Singh* line of cases says everything about the exercise of the power to detain (when properly it can be exercised and when it cannot); nothing about its existence."

Legality under HKBOR

Article 5 of HKBOR

33. Under Article 5 detention must not be arbitrary and the grounds and procedure for detention must also be certain and accessible. Mr Dykes submitted that in the absence of some published policies as to the circumstances under which the power to detain would be exercised, the power of detention under section 32 is contrary to Article 5(1) of HKBOR.

34. In *Amuur v France* (1996) ECHR 25 at [50], the European Court of Human Rights observed:

> "50 .... Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness ...
>
> ... In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the

> other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty - especially in respect of a foreign asylum-seeker - it must be sufficiently accessible and precise in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies."

35. In *R v Governor of Brockhill Prison Ex Parte Evans* 2 [2001] 2 AC 19, Lord Hope of Craighead said at page 38:

> "The second question is whether, assuming that the detention is lawful under domestic law, it nevertheless complies with the general requirements of the convention. These are based upon the principle that any restriction on human rights and fundamental freedoms must be prescribed by law (see arts 8 to 11 of the convention). They include the requirements that the domestic law must be sufficiently accessible to the individual and that it must be sufficiently precise to enable the individual to foresee the consequences of the restriction ... The third question is whether, again assuming that the detention is lawful under domestic law, it is nevertheless open to criticism on the ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate …"

36. In *Nadarajah v. Secretary of State for Home Department* [2003] EWCA Civ 1768, the English Court of Appeal was concerned with 2 appeals, both concerning asylum-seekers, who had been detained for a period on the ground that their removal from the United Kingdom was imminent, after each had through his lawyer notified the Secretary for State of his intention to initiate proceedings to challenge the decision to remove him. The common issue was whether in those circumstances the detention of the asylum-seeker was lawful, having regard to the policy that the Secretary of State purported to follow and to the requirements of the Human Rights Act 1998. The policy which the Secretary of State followed

B was contained in Chapter 38 of the Operations Enforcement Manual B
C ("Chapter 38") relating to detention of immigrant. Section 6(1) of the C
D Human Rights Act makes it unlawful for the Secretary of State to act in a D
E way which is incompatible with specified articles of the European E
F Convention on Human Rights, including Article 5. There is no material F
G difference between Article 5 of European Convention and Article 5 of G
H HKBOR. The English Court of Appeal concluded that the detention was H
I unlawful, and the declaration regarding each of the applicants that his I
J detention was unlawful was upheld. J

> "64. … In *The Sunday Times v The United Kingdom* [1979] 2 EHRR 245 … held at para. 49 that the phrase 'prescribed by law' in Article 10(2) required that:
>
> > '… the law must be adequately accessible: the citizen must have an indication which is adequate in the circumstances of the legal rules which are applicable to the given case.'
>
> 65. Another requirement recognised in that decision was that the law should enable those affected by it reasonably to foresee the consequences of their actions. Of course, if the law is not accessible, this requirement will also not be satisfied. In our judgment, these principles apply to the question of whether detention of N and A was lawful in the present case.
>
> 66. It was known, because it was published, that imminent removal was one of the reasons for detaining an asylum seeker. The evidence is not clear as to how widely it was known that it was the policy of the immigration service not normally to treat removal as imminent once proceedings challenging the right to remove had been instituted, but those acting for both N and A appear to have proceeded on the basis that this was axiomatic, and it is reasonable to infer that this practice was generally known to solicitors specialising in immigration work. What, on the evidence, was not known was that it was the policy of the immigration service, when considering the imminence of removal, to disregard information from those acting for asylum seekers that proceedings were about to be initiated, however credible that information might be.
>
> 67. In this respect we conclude that the Secretary of State's policy was not accessible, nor was the effect of failure to commence proceedings, of which notice had been given to the immigration service, foreseeable."

39. Mr Chow submitted that there is no principle of law which requires that a holder of general statutory power must publish some policy or written guidelines as to how he would exercise the power. He submitted that it is well-established that it would be unlawful for a statutory authority to fail to exercise a discretion in any given case by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of

discretionary power that discretion must be brought to bear on every case: each case must be considered on its own merits and decided as the public interest requires at the time: *Wade & Forsyth on Administrative Law, 9th Edition*, pages 324-326.

40. But we are here concerned with situations where Article 5 of HKBOR applies. Here the critical question is not whether there are policies as to the circumstances under which the power to detain might be exercised, the question is whether the grounds and procedure for detention are sufficiently certain and accessible, as is required by Article 5.

41. Mr Chow accepted that detention under section 32 is not mandatory or automatic. That a person may be removed under section 25 gives rise to the power to detain under section 32, but section 32 is silent on how that power should be exercised. As the Chief Justice said in *Thang Thieu-quyen* at 188:

> "… the *Hardial Singh* principles require that the period of detention must be reasonable. What is reasonable is to be determined by reference to the statutory purpose."

Article 5 also requires that the grounds and procedure for the exercise of the power to detain must be certain and accessible. They could be made certain by a policy and accessible by publication. But the making of a policy is not the only way. Legislation, whether substantive or subsidiary, may do as well. But the question in every case must be, whether the grounds and procedure for detention are sufficiently certain and accessible.

42. Lord Phillips MR said in *Nadarajah*:

> "54. … Our domestic law comprehends both … Immigration Act 1971 and the Secretary of State's published policy …"

We feel sure that in *Nadarajah* had there been no policy at all the English Court of Appeal would have found that the domestic law was not sufficiently certain.

43. Mr Chow submitted that *Nadarajah* was distinguishable. There the Home Secretary had a policy. Since there was a policy, the policy must be accessible. But, here, his primary submission is that there is no policy. As we have explained, the question is not whether there are policies, but whether the grounds and procedures for detention are certain and accessible. It does not make sense that if there is a policy, the court may consider whether the policy is lawful, and if so whether the policy is accessible but that if there is no policy, it does not matter that one does not know at all the basis upon which detention was ordered.

44. Mr Chow then submitted that the learned judge was right that having regard to *Hardial Singh* and general administrative law, the discretion of the Secretary under the Ordinance could not be regarded as unfettered. But, with respect, the point is not whether the power is unfettered but whether the grounds and procedure for its exercise are sufficiently precise and accessible. Section 32 does not spell out the circumstances under which the power to detain pending removal might be exercised.

45. The learned judge and Mr Chow relied on the judgment of Keith J (as he then was) in *Chieng A Lac and Others v Director of Immigration* [1997] 7 HKPLR 243, where Keith J said he regarded:

> "… The *Hardial Singh* principles constitute the checks and balances recognised by our system of law to prevent abuse of the exercise of the statutory power of detention. … represent a comprehensive and coherent code for ensuring that the detention of an asylum-seeker is not, and does not become, arbitrary." at 274H-275B

46. Hartmann J said:

> "111. …
>
> (iv) The *Hardial Singh* principles going to reasonableness set down guidance for the exercise of the power of detention. Keith J has described the principles as representing 'a comprehensive and coherent code for ensuring that the detention of an asylum-seeker is not, and does not become, arbitrary'.
>
> (v) As a code, the *Hardial Singh* principles are part of Hong Kong's domestic law, they are accessible and precise in their ambit."

Hardial Singh provides a useful illustration that statutory powers:

> "… can validly be used only in the right and proper way in which Parliament when conferring it is presumed to have intended." *Wade & Forsyth on Administrative Law, 9th Edition*, pages 354-355.

47. In *Chieng A Lac*, Keith J was concerned with the detention of Vietnamese refugees under section 13D(1) in Part III A of the Ordinance. There the applicants also relied on Article 5 of HKBOR. The legality of the detention was challenged on the basis of its length, its indefinite nature and the reasons why it was ordered, namely, deterrence, security and public opinion. As Keith J made clear the reasons for the policy of

automatic detention under section 13D(1) had been “comprehensively and clearly stated”. Nor was any point taken about the accessibility or certainty of that policy.

48. In that context Keith J said the material part of Article 5(1), was:

> “Everyone has the right to liberty … of person. No one shall be subjected to arbitrary … detention.”

49. Keith J then explained:

> “The word ‘arbitrary’ suggests something whimsical or capricious, something for which one could not give a sensible reason if asked. The reasons for the policy of automatically detaining the applicants are neither whimsical nor capricious. People may argue over whether the policy is really necessary or desirable, but the policy cannot be criticised on the basis that it does not make sense.”

50. Keith J went on to consider the matter on the basis that the word ‘arbitrary’ also meant “unjustifiable” and in that context he concluded that the policy of automatic detention was justifiable for the reasons given on behalf of the Director. In the passage quoted in para. 45 above, Keith J was not concerned with the question whether the policy was certain and accessible.

51. It may be that when the full implication of the *Hardial Singh* principle is worked out in the courts, one would know the true limits to the power to detain under section 32. In that event, it may be that the law could be said to be sufficiently certain. But even if the true limits could be ascertained from *Hardial Singh* and subsequent cases, that would not satisfy the requirement that the grounds and procedure must be accessible.

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They would not be reasonably accessible to a convention claimant. What accessibility requires will depend on the circumstances and common sense must come into it. But we feel sure that in the case of a convention claimant, they cannot be regarded as sufficiently accessible even if they could be found in "*Hardial Singh* and subsequent authorities".

52. Insofar as Hartmann J thought otherwise, with respect, we disagree.

The Director's Policy

53. Mr Chow's primary submission is that the Director does not have a policy, and that the law does not require him to have one. We have already dealt with these submissions. We add only that it is inconceivable that the Director has no policy at all.

54. Mr Chow's alternative submission is that the Director does have a policy and that it is accessible. The policy is said to be contained in a document headed "Supplementary information in relation to situation of refugees, asylum seekers, and torture claimants", supplied to the Legislative Council ("LegCo"), by LC Paper No. CB(2)526/06-07(01) ("the LC Paper"). The policy is said to be contained in para. 17 of this document which reads:

> "17. In considering whether to grant recognizance in lieu of detention, ImmD will taken into account (a) whether the person concerned constitutes a security risk to the community; (b) whether there is any risk of the person absconding and (re)offending; and (c) whether removal is not going to be possible within a reasonable time. As a rough indication, some 4% of the detainees were detained because they failed to meet 1

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> criterion; some 60% could not meet all the three criteria and the rest failed to meet either two of the criteria."

55. The LC Paper was not produced before the learned judge. Mr Chow sought leave to rely on it before us. Mr Dykes did not object. Mr Chow submitted that although this is a statement of the policy, this should not be taken as an exhaustive statement.

56. In *Nadarajah*, the policy relied upon by the *Home Office* stated, inter alia:

> "38.3 Factors influencing a decision to detain
>
> 1. There is a presumption in favour of temporary admission or temporary release.
>
> 2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.
>
> 3. All reasonable alternatives to detention must be considered before detention is authorised.
>
> 4. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.
>
> 5. There are no statutory criteria for detention, and each case must be considered on its individual merits.
>
> 6. The following factors must be taken into account when considering the need for initial or continued detention.
>
> For detention
>
> · what is the likelihood of the person being removed and, if so, after what timescale?;
>
> · is there any evidence of previous absconding?;
>
> · is there any evidence of a previous failure to comply with conditions of temporary release or bail?;

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- has the subject taken part in a determined attempt to breach the immigration laws? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry);
- is there a previous history of complying with the requirements of immigration control? (e.g. by applying for a visa, further leave, etc);
- what are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? Does the person have a settled address/employment?;
- what are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?

Against detention:

- is the subject under 18?
- has the subject a history of torture?
- has the subject a history of physical or mental ill health?"

57. So we can well believe the para. 17 is an incomplete statement of the Director's policy.

58. In *Nadarajah*, the English Court of Appeal upheld the declaration that the detention was unlawful because the policy was not accessible in its entirety.

59. We are not prepared to assume that para. 17 contains a sufficient statement of policy. Nor would a reader of para. 17 realise that it is supposed to contain a statement of the Director's policy on detention of a convention claimant under section 32.

60. In any event, we are not satisfied that it was accessible. Mr Chow said the LegCo Paper is available on the website of the LegCo. It is not known whether the policy was available on the website of the Immigration Department. But as Mr Dykes has submitted a person in detention would not have access to the Internet. We do not believe that the guideline could be said to be accessible.

61. Furthermore, the LegCo paper was dated 1 December 2006. ‘F’ was ordered to be removed and detained on 30 June 2005. ‘F’ was placed under detention on 28 May 2005 pending the decision of removal order. In the case of ‘A’, he was ordered to be removed on 17 June 2006. In the case of ‘AS’, he made his claim on 14 June 2005. In the case of ‘YA’, he was refused admission on 16 October 2006 at which time he made the claim for refugee status and that he was detained from 14 December 2006. So the LegCo Paper was not in existence when ‘S’, ‘F’ and ‘AS’ were detained.

62. Mr Chow also submitted that the applicants had been told the basis of their detention when their request for release on recognizance was rejected. We do not believe such piecemeal disclosure of policies would satisfy Article 5(1)’s requirement that the grounds be certain and accessible.

63. Article 5 requires that the detention be not arbitrary and in accordance with certain and accessible grounds and procedure. In other words, it is for the Director to justify detention and not for the applicant to seek release from detention. The existence of clear and lawful policy ensures that the Director, when making his decision whether or not to

detain, would have had all the relevant circumstances under consideration, and that the decision to detain would not be arbitrary. The availability of such grounds would also enable an applicant to know how best to ensure that he is not detained. To be told the grounds why release on recognizance was refused is not a sufficient compliance with the requirement that the grounds and procedure for detention should be certain and accessible. Insofar as Hartmann J thought otherwise, with respect, we disagree.

64. In any event, the letters relied on by Mr Chow are far from satisfactory, apart from the fact that they were concerned with release on recognizance, and we are concerned with the decision to detain.

65. In the case of 'A', the letter from the Director dated 17 June 2006 responding to Messrs Barnes & Daly's request for release on recognizance, said:

> "… As regards your request to release your client on recognizance, please note that the request will be considered in the light of the circumstances of the case e.g. any risks he would pose to the law and order of Hong Kong, the risk of his absconding following release on recognizance, etc. You will be informed of our decision on the matter once it is made."

66. By letter dated 6 August 2006, 'A' was further told:

> "… Having considered all the relevant circumstances of your case, we regret to inform you that the request for release on recognizance cannot be acceded to. However, should there be any change in the circumstances of your case, we are prepared to consider the matter again upon request."

67. On 17 August 2006, Messrs Barnes & Daly were told:

> "… Given the fact that a removal order was made against your client on 15 June 2006, he is currently being detained under Section 32(3A) of Cap. 115, the Immigration Ordinance ('the Ordinance') pending removal from Hong Kong. There is clear legal authority for us to detain your client who is an overstayer in Hong Kong against where a removal order was made pending his removal from Hong Kong. As regards our consideration of a request to release a detainee on recognizance under section 36(1) of the Ordinance, you may wish to note that the Director is entitled to assess all the relevant circumstances of each detention case in making a decision. In this respect, the relevant circumstances include, inter alia, the prospect of effecting his removal or deportation within a reasonable time, any risks which a detainee may pose to the law and order of Hong Kong in addition to the risk of his absconding and/or re-offending should he be released from detention on recognizance under section 36(1) of the Ordinance. Each request for release on recognizance is to be considered on the particular facts of each case.
>
> Regarding your request for your client's release on recognizance, after our careful consideration of all the circumstances of your client's case, *in particular* the facts that he had previously gone underground and overstayed for a lengthy period of 2 1/2 years, the refusal of his asylum claim by the United Nations High Commissioner for Refugees in Hong Kong and that active steps are being taken by the Director to verify his torture claim, your request cannot be acceded to at this stage. However, should there be any change in the circumstances of your client's case, we are prepared to consider the matter again upon request." [Emphasis added]

68. The letter of 17 June 2006 does not contain a statement of all the grounds thought to be relevant to 'A''s case, still less all the grounds that might be taken into account. The letter of 6 August 2006 is even less informative. The letter of 17 August 2006 again failed to state all the grounds which were relevant to the Director's consideration of 'A''s case.

69. We will not go on to consider the letters relied on in relation to the other applicants. Suffice to say that they are no better than the letters written to 'A' or his solicitors.

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Article 5(4)

70. Article 5(4) requires that the lawfulness of the decision to detain should be determined by the court. Mr Dykes submitted that the proceedings by way of judicial review or the writ of habeas corpus, are unsatisfactory and insufficient compliance with the requirement of Article 5(4). Here we are in respectful agreement with Hartmann J that proceedings by way either of judicial review or habeas corpus are capable of adequately meeting the requirements of Article 5(4), and that:

> "91. … with the liberty of the subject at stake, the courts must act as primary decision-makers, taking into account all relevant circumstances."

Conclusion

71. We allow the appeals with costs. The Applicants' own costs to be taxed in accordance with the Legal Aid Regulations. We are minded to declare that the detention was unlawful after the making of the convention claims. However, we have heard no submissions on the wording of the actual declaration which should be made. We invite the parties to provide an agreed wording for the court's consideration. Failing agreement, the parties should provide written submissions to the court.

(Robert Tang) Vice-President	(Andrew Cheung) Judge of the Court of First Instance	(Aarif Barma) Judge of the Court of First Instance

Mr. Philip Dykes, SC and Mr. Hectar Pun,
instructed by Messrs Barnes & Daly, assigned by Director of Legal Aid for 'A' and 'YA'

Mr. Philip Dykes, SC and Ms. Ho Wai Yang,
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Mr. Anderson Chow, SC and Ms. Grace Chow,
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