HCAL 70/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 70 OF 2011

BETWEEN

ABID SAEED	Applicant
and	
DIRECTOR OF IMMIGRATION	1st Respondent
SECRETARY FOR SECURITY	2nd Respondent

Before: Hon Lam J in Court
Date of Hearing: 29 August 2011
Date of Judgment: 29 August 2011

J U D G M E N T

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1. By an application filed on 23 August 2011, the Applicant, Mr Abid Saeed, seeks leave from this court to apply for judicial review to

challenge certain decisions of the Director of Immigration. The various decisions were set out in his Form 86.

2. In essence, he wants to challenge the decision of the Director in terms of a removal order against him. In the Form 86 he said the removal order was dated 15 March 2011, but in the document produced, the removal order was actually dated 25 February 2011. I believe the Form 86 reference to 15 March was a typing mistake. The Applicant has actually appealed against that removal order, but his appeal was dismissed by the Immigration Appeal Tribunal on 28 March 2011.

3. The removal order was made on the basis of section 19(1)(b) of the Immigration Ordinance. The ground was that the Applicant had landed in Hong Kong unlawfully. Actually, he came to Hong Kong unlawfully in October 2006. Shortly after his entry, he was arrested by police for illegally remaining in Hong Kong.

4. Soon after his arrest he made a torture claim under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The torture claim was processed and ultimately rejected on 10 January 2011. He had appealed against that determination, but that appeal was also rejected by the Chief Executive on 11 February 2011. In 2007 he also advanced a refugee claim with the UNHCR, but that claim was rejected by the UNHCR on 24 April 2007.

5. After the disposal of both his torture claim and refugee claim, the Director of Immigration made the removal order. Whilst previously he was released on recognisance under section 36 of the Immigration

Ordinance (and that has been the position since 18 January 2007), after the making of the removal order the Applicant was detained since 11 March 2011.

6. The other decision that the Applicant wishes to challenge is the decision of the Director of Immigration to detain him. The Director said the detention was made pursuant to section 32(3A) pending removal pursuant to a removal order under section 19(1)(b).

7. The Applicant's challenge to the removal order is on the basis that he has a pending civil claim in the District Court in DCCJ562 of 2011. In that action, he was represented by lawyers assigned to him by Legal Aid. He claimed damages from the Secretary for Security and Director of Immigration in relation to his detention in 2006 after he was arrested for illegally remaining in Hong Kong, or, more accurately, for illegally entering and remaining in Hong Kong.

8. The writ in the District Court action was issued on 16 February 2011. Defence was filed on 16 May 2011 and reply was filed on behalf of the Applicant on 11 June. According to the directions given by a master of the District Court, there will be a case management conference in October 2011. It therefore appears that the case would not come on for trial until perhaps some time next year. As mentioned, the Applicant is represented by solicitor as well as counsel assigned by the Legal Aid Department in the District Court action.

9. As I have said in a recent case in *Zaman v Director of Immigration* HCAL 63 of 2011, a decision of 19 August 2011, the mere

fact that an applicant has a pending civil case against the Director for damages by itself is not a sufficient reason for resisting deportation or removal.

10. Bearing in mind the fact that the Applicant is represented by lawyers, I do not see any compelling reason why he has to be allowed to remain in Hong Kong for the purpose of waiting for the trial of the civil claim. Actually, in Hong Kong we have many civil actions in which litigants are not presently in Hong Kong when they are preparing for litigation and waiting for trial. Provided that they have lawyers to act for them here, their absence would normally not be an impediment in terms of the preparation.

11. In *Zaman*, because there was impending mediation, the Director of Immigration agreed to withhold the enforcement of deportation order to facilitate mediation to take place in September. In the present case there is no prospect for mediation.

12. I accept that the Applicant might need to come to Hong Kong to give evidence. That would be at the trial. But the trial is nowhere near.

13. The Applicant said the Director of Immigration has not undertaken to grant him a visa to come back to give evidence for his trial. The Director has to exercise his discretion by reference to the prevailing circumstances at the time when the application for visa is actually made. Therefore I do not regard the reluctance to give an undertaking at this stage as refusal by the Director of Immigration to consider his need to come back to give evidence for the purpose of the trial. In the event that the

Director of Immigration unreasonably refuses to grant the Applicant a visa to come back to give evidence at the trial, I have no doubt that those acting for the Applicant in the civil case can apply for an adjournment of the civil trial pending challenge by way of judicial review to this court against the Director of Immigration's unreasonable decision.

14. Because of that, I do not regard the pending civil action in the District Court as a good ground for deferring the execution of the removal order.

15. The Applicant tells the court he wishes to remain here until the trial has concluded. But in the first place he has no right to be here. He entered Hong Kong illegally and he remained here without the permission of the Director.

16. I do not see any arguable ground to challenge the removal order.

17. Turning to the detention, the Applicant has been detained since 11 March, and he complains that he has been detained for more than five months. He is somehow labouring under the misapprehension that detention cannot be more than 60 days. It seems that misapprehension stems from the 60 days requirement as to the making of a removal order the specified situations under section 18 of the Immigration Ordinance. Under section 18(2) of the Immigration Ordinance, a person who is refused permission to land in Hong Kong may not be removed from Hong Kong under section 18(1)(a) after the expiry of two months beginning with the date on which he landed.

18. That two months time limit relates to the time given to the Director to make an order for removal under section 18(1)(a). It has no application to the present case because the removal order was made under section 19(1)(b). In any event, it has nothing to do with the time limit for detention. The time limit for detention is prescribed by section 32 of the Immigration Ordinance.

19. The Applicant has also referred me to paragraphs 53 to 55 of his Form 86, which I was told that was prepared by his lawyers on his behalf. In those paragraphs, it is suggested that the relevant time limit for detention was set out in section 32(4) of the Immigration Ordinance.

20. In my view, that is entirely misconceived because section 32(4) of the Immigration Ordinance deals with a situation where, notwithstanding the making of a removal order against him, the presence of a person in Hong Kong is necessary for the purpose of giving evidence in a criminal trial. That has nothing to do with the present case because there is no suggestion whatsoever that the Applicant is being detained for the purpose of giving evidence in a criminal trial.

21. The relevant provision for present purposes are section 32(3A) and (4A). Subsection (3A) provides that:

> "A person in respect of whom a removal order under section 19(1)(b) is enforced may be detained under the authority of the Director of Immigration pending his removal from Hong Kong under section 25."

And subsection (4A) provides that:

> "Detention of a person under this section shall not be unlawful by reason of the period of detention if that period is reasonable having regard to all the circumstances affecting that person's detention."

Subsection (4A) goes on to set out some relevant considerations, including the extent to which it is possible to make arrangements to effect his removal and whether or not the person has declined arrangements made or proposed for his removal.

22. Hence the relevant questions are: first, the detention must be for the purpose of the removal; and second, the detention period has to be reasonable having regard to all the circumstances.

23. In the present case, the detention is for the purpose of effecting the removal - the lapse of time is accounted for by the following events. After the detention of the Applicant in March 2011, the Applicant had tried to reopen his refugee claim with the UNHCR, and it was only in May 2011 that the UNHCR confirmed that the file would not be reopened. Further, in April 2011, the solicitor acting for the Applicant has indicated that he intends to obtain legal aid to challenge the determination as to his torture claim. After legal aid was refused on 29 April, he appealed against that refusal and it was only on 5 July that the Director of Immigration was informed of the dismissal of the legal aid appeal.

24. Thereafter, the Director tried to effect the removal by seeking the Applicant's co-operation. At that stage, given the fact that his original passport has expired, his co-operation was required in terms if his signature for an application to obtain a new passport from the Consulate-

General of Pakistan. On 7 and 18 July respectively, the Applicant declined to do so.

25. Thereafter, on or about 22 July 2011, the Director of Immigration got confirmation from the Consulate-General of Pakistan that even without the Applicant's signature, a new passport can be issued in the present circumstances to facilitate his removal.

26. At today's hearing I was told by counsel appearing on behalf of the Director of Immigration that in the light of the recent developments, the removal of the Applicant can be effected in about one week's time, or maybe slightly more than one week, depending on the issue of the new passport by the Consulate-General.

27. Having these in mind, the following conclusions can be drawn. Firstly, I think it was reasonable for the Director not to immediately effect the removal after the detention, given that the Applicant had tried to reopen his refugee claim and also applied for legal aid to challenge the torture claim. The delay was actually for the Applicant's own benefit in order that he be given sufficient opportunity to exhaust whatever he wishes in relation to his refugee claim and torture claim.

28. As regards the subsequent period after the dismissal of his legal aid appeal in early July, the delay was mainly due to the Applicant's refusal to sign the application of his new passport. I do not see how the Director can be blamed for trying to get his co-operation in terms of getting a new passport. The Applicant said he refused to sign because he wanted to remain in Hong Kong until he completed his civil case in the

District Court. I have already explained why that is not a good reason for his refusal to leave Hong Kong. He has no right to be here in the first place.

29. Therefore, in the light of all the relevant circumstances in the present case, I do not think it is arguable that the Director has detained the Applicant for an unreasonable period of time.

30. I wish to emphasise again, bearing in mind that he is represented by both solicitor and counsel in the District Court case, the fact that he would be removed from Hong Kong should not be causing any impediment to his prosecution of his civil claims in the District Court. The evidence also shows that even though he was detained, he was given full access to his lawyers, and as he told me, his lawyer prepared the papers in relation to the present application for leave for judicial review on his behalf.

31. I do not see any reason why, between now and his actual removal, perhaps in a week's time or slightly more than that, his lawyers cannot prepare the necessary witness statement for him and get the necessary interlocutory matters sorted out with him insofar as they could be sorted out in the meantime. If he needs to come back to give evidence at the trial in the civil case, I have already alluded to the possible actions he and his lawyers could take. That again should not be an impediment to the proper prosecution of the civil case.

32. Because of all these, I do not see any reasonable prospect in the Applicant's intended challenge to the decisions of the Director, and the application for leave is refused.

Submissions on costs

33. In respect of costs, I am prepared to be slightly lenient this time because the decision I referred to, *Zaman*, has not perhaps received as much attention as it should have. I do not blame the Applicant for that because that is a recent decision. And he is making the application on the basis of what he has been advised. Therefore, on this occasion I am not going to make any order as to costs. In these recent applications to challenge the removal by the subjects of deportation or removal orders having pending civil claims against the Director in the District Court, although the applications were made by these people in person, they were assisted by the lawyers who represent them in their civil claims. What I have said today in terms of the decision in the present case will be reduced into writing and published. I hope they will receive the attention of those who advise people in similar situations in the future. They should also be advised that the court may not be as lenient as today in terms of dealing with costs in the future.

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

Applicant in Person

Miss Grace Chow, instructed by the Department of Justice, for the 1st and 2nd Respondents