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CACV 87/2010

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

CIVIL APPEAL NO. 87 OF 2010

(ON APPEAL FROM HCAL NO. 75 OF 2009)

BETWEEN

ASIF ALI	Applicant
And	
DIRECTOR OF IMMIGRATION	1st Respondent
SECRETARY FOR SECURITY	2nd Respondent

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

Date of Hearing: 4 March 2011

Date of Handing Down Judgment: 28 June 2011

J U D G M E N T

Hon Stock VP:

The issue

1. Section 2(4)(b) of the Immigration Ordinance provides that a person shall not be treated as ordinarily resident in Hong Kong during any period of imprisonment or detention pursuant to the sentence or order of any court.

2. The question which arises in this case concerns the effect of that provision upon a period of remand in custody pending a trial that results in a conviction: is that period excluded from categorisation as a period of ordinary residence?

Introduction

3. This is an appeal from a decision of Andrew Cheung J (as he then was) on 25 March 2010 whereby he dismissed an application for judicial review.

4. The applicant's case is that in February 2006, he made an application for verification of status as a permanent resident but that in May 2007 that application was wrongfully rejected by the Director of Immigration. In November 2007 the Secretary for Security issued a deportation order against him and in June 2008 refused to rescind that order. Since a Hong Kong permanent resident enjoys the right of abode and that right carries with it the right not to have a deportation order made against him, it was said that those two deportation decisions were also unlawful. So in July 2009 the applicant filed an application for leave to apply for judicial review of those three decisions. Leave was granted and it is the review of those decisions with which this appeal is concerned.

Permission to stay

5. The applicant is a national of Pakistan who came to Hong Kong on 23 May 1997. He was then aged 16 years and was permitted to enter as a visitor. He has a father and siblings who reside in Hong Kong.

6. In August 1997, his status was changed to that of a dependant of his father. His permission to remain on that basis was extended from time to time, last expiring on 18 March 2006.

7. It is common ground that but for the applicant's detention and subsequent sentence of imprisonment consequent upon the initiation of criminal proceedings in late 2005, the applicant had by late March 2006 been ordinarily resident in Hong Kong for at least seven years.

The criminal proceedings

8. In August 2004, there was a fracas between two groups in Tsim Sha Tsui. The applicant was a member of one of the groups. One of the men was charged with two counts of wounding with intent. The applicant testified for him in August 2005 and in the course of that testimony admitted that he was in fact the assailant. So in September 2005 he was arrested for those two offences.

9. He was at first placed on bail, with no reporting restrictions and no requirement that he should not leave Hong Kong. But when the case was transferred to the District Court on 25 November 2005, he was remanded in custody pending trial. On 30 March 2006, he was convicted after trial and sentenced to 3 years' imprisonment.

Correspondence

10. On 14 February 2006, that is to say whilst the applicant was in custody awaiting trial, a letter was written in Urdu, signed by the applicant to the Director of Immigration, the translation of which reads as follows:

> "With due respect, it is requested that my name, Asif Ali [ID no. provided] with place and date of issue, Hong Kong 2001. Respected sir, I have not been granted an unconditional stay yet. And my visa is going to be expired on 18th of March, next March. Either demanding an extension stay or an unconditional stay, in order to apply for Hong Kong permanent ID, I need your suggestions so that I can rest on aside. I would be obliged to the Sir for this favour or then send me a form which can solve out for me. I should be obliged to you for the rest of my life. I certify this declaration upon reading and listening and signed.
>
> The entire content is a true statement. I put my signature having read it, together with the witnesses. Thanks to you. Declarant"

11. The envelope was addressed to the Director of Immigration, Right of Abode section and the reverse side of the envelope made clear that the addressee was at Lai Chi Kok Reception Centre.

12. It is evident that the letter was received by the Right of Abode Section of the Immigration Department on 17 February 2006.

13. The reply came from the Information and Liaison Section and was dated 6 March 2006, addressed to the applicant at the Lai Chi Kok Reception Centre. It read:

> "Thank you for your letter of 14-2-2006 which was received on 17 February 2006.
>
> Generally speaking, foreign nationals who are permitted to work, study or reside in Hong Kong should apply for extension of stay within one month before the expiry of their limit of stay if they intend to continue residence in Hong Kong. Application for extension of stay should be submitted to the Extension Section (5/F Immigration Tower, 7 Gloucester Road, Wanchai, Hong Kong) or any Immigration branch office with the following documents:
>
> (1) a completed application form ID 91;
>
> (2) applicant's travel document and HK identity card;
>
> (3) Sponsor's travel document or Hong Kong Permanent Identity Card; Sponsor's undertaking of continuous sponsorship and sponsor's declaration of not absent from Hong Kong for more than 180 days in the previous 12 months and for dependant

> spouse, applicant's declaration of no change in matrimonial relationship.
>
> Application form for extension of stay (ID 91) could be downloaded at the following website [address given].
>
> The fee for extension of stay is HK$135.
>
> In general, applications for extension of stay require the applicant to submit the application and to collect the visa. The applicant must be in Hong Kong at the time of application and collection of visa. Application by fax or e-mail is not acceptable.
>
> I hope you will find the above information useful."

14. The applicant took no further steps and on 30 March he was, as I have indicated, sentenced to a term of three years' imprisonment.

15. What happened next was that by letter dated 1 September 2006, the Director notified the applicant that he was considering applying for the applicant's deportation because the conviction for wounding with intent led the Director to conclude that the applicant's continued presence in Hong Kong posed a threat to law and order.

16. The applicant then instructed solicitors who, in October 2006, asserted that the applicant was entitled to the right of abode in Hong Kong and an application form entitled "Application for Verification of Eligibility for Permanent Identity Card" was forwarded to the Director in November 2006. It was therein asserted that the period of ordinary residence in Hong Kong was 21 August 1997 to 24 November 2005. With the application was a declaration that the applicant had taken Hong Kong as his place of permanent residence.

17. The internal records of the Immigration Department show that the Director took the view that the period from 25 November 2005 to 29 March 2006 was a period of detention and therefore constituted a break in continuity

of ordinary residence. It is interesting, but not conclusive, to note that one of the minutes in the file of the Department puts forward the view that there was a weak basis upon which to suggest that the applicant's letter of 14 February 2006 was not an application for a permanent identity card.

18. In a letter dated 22 January 2007, those acting for the applicant asserted that the letter of 14 February 2006 should be taken as the application for verification of eligibility for a permanent identity card.

The challenged decisions

19. By letter dated 15 May 2007, the Director communicated his decision that the applicant had not established seven continuous years of ordinary residence in Hong Kong immediately prior to his application of 15 November 2006. He stated that the letter of 14 February 2006 was not an application for a permanent identity card and fell "within the same class of public enquiries received by the Department daily to which a reply had then been made by our Information and Liaison Section in accordance with standing practice." In any event, he said, the period of remand between 25 November 2005 and 29 March 2006 was, by reason of section 2(4)(b) of the Immigration Ordinance, Cap. 115 precluded from classification as a period of ordinary residence.

20. On 22 November 2007, the Permanent Secretary for Security made the deportation order. The applicant was released from imprisonment the following day but was detained for the purposes of deportation.

21. An application was made to rescind the deportation order but, by letter dated 25 June 2008, that application was rejected.

The statutory provisions

22. Article 24(2) of the Basic Law provides that:

> "The permanent residents of the Hong Kong Special Administrative Region shall be:
>
> (4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;
>
> …"

23. Article 24(3) of the Basic Law stipulates that:

> "The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode."

24. Schedule 1 to the Immigration Ordinance sets out, in paragraph 2, the various categories of persons who are permanent residents including, at paragraph 2(d), non-Chinese nationals. Paragraph 2(d) of Schedule 1 to the Ordinance reflects the provisions of Article 24(2)(4) of the Basic Law.

25. In paragraph 3(1) of Schedule 1 to the Ordinance, the requirements for establishing permanent residence under paragraph 2(d) are set out:

> "For the purposes of paragraph 2(d), the person is required -
>
> (a) to furnish information that the Director reasonably requires to satisfy him that the person has taken Hong Kong as his place of permanent residence. The information may include the following -
>
> (i) whether he has habitual residence in Hong Kong;
>
> (ii) whether the principal members of his family (spouse and minor children) are in Hong Kong;

(iii) whether he has a reasonable means of income to support himself and his family;

(iv) whether he has paid his taxes in accordance with the law;

(b) to make a declaration in the form the Director stipulates that he has taken Hong Kong as his place of permanent residence; the declaration for a person under the age of 21 years must be made by one of his parents or by a legal guardian; … ”

26. Paragraph 3(2) of Schedule 1 to the Ordinance states that:

“A person claiming to have the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) does not have the status of a permanent resident in the Hong Kong Special Administrative Region until he has applied to the Director and the application has been approved by the Director.”

27. As regards the qualifying period of ordinary residence for the purposes of establishing permanent residence status under paragraph 2(d) of Schedule 1 to the Ordinance, paragraph 1(4)(b) of the Schedule is relevant. It says:

“For the purposes of calculating the continuous period of 7 years in which a person has ordinarily resided in Hong Kong, the period is reckoned to include a continuous period of 7 years –

…

(b) for a person under paragraph 2(d), before or after the establishment of the Hong Kong Special Administrative Region but immediately before the date when the person applies to the Director of Immigration for the status of a permanent resident of the Hong Kong Special Administrative Region.”

28. Section 2(4) of the Ordinance provides that:

“For the purposes of this Ordinance, a person shall not be treated as ordinarily resident in Hong Kong –

...

(b) during any period, whether before or after the commencement of this Ordinance, of imprisonment or detention pursuant to the sentence or order of any court.”

The decision below

29. The question which the learned judge took as the key question was "whether a period of detention pending a trial, which results in a conviction and sentence of imprisonment, is an excluded period with the meaning of section 2(4)(b) of the Ordinance.

30. He referred to the decision of Bokhary PJ in *Fateh Muhammad v Commissioner of Registration & Another* (2001) 4 HKCFAR 278 at 283-4:

> " Section 2(4)(b) of the Immigration Ordinance (Cap. 115), provides that "a person shall not be treated as ordinarily resident in Hong Kong … during any period … of imprisonment or detention pursuant to the sentence or order of any court". This provision has been in the statute book since 1971. In challenging its constitutionality, Mr Philip Dykes SC for Mr Muhammad says that what it catches includes even: detention pending a trial which results in acquittal or the dropping of charges; detention due to mental illness; detention as a debtor; detention pending extradition which eventually fails; detention of an eventually acquitted person due to a refusal by a magistrate of bail which is then granted by a judge; and one day's imprisonment.
>
> As to the last item in that list of Mr Dykes's, I would not like to think that such pointless deprivations of liberty are part of the Hong Kong legal scene. In any event, I would not preclude an argument, whether on the *de minimis* principle by which the law ignores trifles or on some other basis, that a term of imprisonment of that short duration would not defeat an abode claimant. The view might well be taken that such a short period of imprisonment does not interrupt the continuity of residence for the purpose of art. 24(2)(4) of the Basic Law and, accordingly, of s.2(4)(b) of the Immigration Ordinance.
>
> Turning to the other items in Mr Dykes's list, I would exclude them from s.2(4)(b)'s ambit on this simple basis. In a provision like s.2(4)(b) "detention" and "order" must, in my view, be read as being of the same nature as "imprisonment" and "sentence" respectively. Accordingly the only kind of detention covered by s.2(4)(b) is detention in a training centre or in a detention centre. (The word "order" in s.2(4)(b) is needed because, although s.4 of the Training Centres Ordinance (Cap. 280), speaks of a "sentence of detention", s.4 of the Detention Centres Ordinance (Cap. 239), speaks of a "detention order".)

….

> No single judicial pronouncement or combination of such pronouncements in regard to the meaning of the expression "ordinarily resident" can be conclusive for the purposes of every context in which that expression appears. But as a starting point at least, Viscount Sumner's observation in *IRC v Lysaght* [1928] AC 234 at p.243 that "the converse to 'ordinarily' is 'extraordinarily'" is, I think, of wide utility. Serving a term of imprisonment, at least when it is not of trivial duration, is something out of the ordinary. Of course it does not mean that a person in prison in any given jurisdiction is never to be regarded as ordinarily resident in that jurisdiction for any purpose. Certainly I would not be disposed to hold, for example, that the fact of being in prison somewhere would of itself render a person not ordinarily resident there when his being so would render him liable to tax.
>
> The present context is a different and somewhat special one. For the question to which it gives rise is this. Does being in prison or a training or detention centre in Hong Kong pursuant to a criminal conviction which has never been quashed and a sentence or order which has never been set aside constitute ordinary residence here when seven years' ordinary and continuous residence here is a qualification prescribed by the Basic Law for attaining a valuable status and right, namely Hong Kong permanent resident status and the right of abode here? In such a context, there is a very strong case for saying that residence while serving a substantial term of imprisonment or detention in a training or detention centre is not ordinary residence. So in my judgment: (i) the answer to the question posed above is "no"; (ii) art.24 of the Basic Law is to be construed accordingly; and (iii) s.2(4)(b) of the Immigration Ordinance (construed in the way explained above) is therefore constitutional."

31. The judge then went on to say that:

> "23. Plainly, a period of remand in custody pending trial is not a period of "imprisonment" within the meaning of section 2(4)(b). The true question is whether it is within the meaning of "detention pursuant to the … order of any court" within the meaning of that subsection. … Significantly, on that basis, Bokhary PJ observed … that "detention pending a trial which results in acquittal or the dropping of charges" does not fall within the meaning of "detention" pursuant to an "order" of the court in section 2(4)(b).
>
> 24. However, this is not what the instant case is about. This case is about detention pending a trial, which results in a conviction and a sentence of imprisonment. Is it in the same nature as "imprisonment" and "sentence"? Or is it in the same league as the examples given by leading counsel for the applicant in *Fateh*

Muhammad, mentioned by Bokhary PJ in the passage extracted above?"

32. The judge continued:

> "31. … What is in issue here is a period of detention pending trial, which results in a conviction, and a sentence of imprisonment. The detention is, by definition, due to the commission of the offence, which the individual is subsequently convicted of. The detention is the result of his own wrong. It is against his wish and can hardly be described as ordinary. …
>
> 32. His case is therefore quite different from the case where a person is detained pending a trial which results in acquittal or the dropping of charges… . Rather, the detention under consideration is in the same nature as imprisonment pursuant to a sentence of the court for the purposes of section 2(4)(d). Indeed section 67A(1) of the Criminal Procedure Ordinance (Cap 221) provides specifically that the length of any sentence of imprisonment imposed on a person by a court shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to the sentence or the offence for which it was passed, or with any proceedings from which those proceedings arose.
>
> …
>
> 34. … the all-important issue is whether, for the purposes of section 2(4) (b), such detention is "of the same nature" as imprisonment pursuant to a sentence imposed by a court after conviction. The reference to section 67A(1) in the present context is to reinforce the point that the two are indeed of the same nature, for the purposes of section 2(4)(b)." (Judgment)

33. In the event, he held that:

(1) On its proper construction, s.2(4)(b) of the Ordinance applies to a period of detention pending a trial which results in a conviction and a sentence of imprisonment;

(2) The applicant's letter dated 14 February 2006 was not an application for verification of status as a permanent resident;

(3) The Director of Immigration was under a duty to act fairly by properly and duly assisting and advising the applicant to make an application for verification of his status and had breached such duty; and

(4) Notwithstanding the breach of duty by the Director of Immigration, there was no real prejudice suffered by the applicant since he could not demonstrate that, had he been properly advised, he would have made an application for verification of status either before 30 March 2006 when he was sentenced to prison or 18 March 2006 when his limit of stay expired, so relief would be denied.

Analysis

34. With respect, I find myself unable to agree with the reasoning in the court below.

35. It seems to me, first, that there is no warrant for widening the ambit of "detention pursuant to an order of the court" envisaged by section 2(4)(b) beyond the parameters set by the judgment of Bokhary PJ set in *Fateh Muhammad*, that is to say, as limited to an order of detention in a training centre or a detention centre; a reading or interpretation which has been endorsed by Ribeiro PJ in *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26 at para 68. In the light of those judgments, it appears to me that an order of a court that a person be detained in custody pending trial is not to be regarded as an order of detention envisaged by section 2(4)(b).

36. Secondly, I do not see that detention pending a trial which results in a conviction is, for the purpose of section 2(4)(b), correctly categorised as in the nature of imprisonment pursuant to a sentence of the court.

37. The status of an applicant for permanent residence is to be determined by the facts prevailing at the date of his application. We see the following from the decision of the Court of Final Appeal in *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26 at paras 59 to 61:

> "59. In *Fateh Muhammad v Commissioner of Registration & Another* (2001) 4 HKCFAR 278, this Court rejected the argument that these three requirements could be satisfied quite independently of each other and at different times prior to the application for permanent resident status. It was held that whether an applicant satisfies the seven year requirement must be judged at the time when the application is made by reference to the period immediately preceding that application, as reflected in Sched.1, para. 1(4)(b) of the Ordinance. It was also held that on the true construction of BL art.24(2)(4), a temporal linkage exists between the seven year and the permanence requirements so that they must be shown to be concurrently satisfied at the time the application for permanent resident status is made: (2001) 4 HKCFAR 278 at p.285, per Bokhary PJ. That the seven year and permanence requirements are concurrent and are to be judged at the time of the relevant application, was not in dispute between the parties to the present appeal.
>
> 60. Bearing the aforesaid structure of the relevant provisions in mind, the wording of, and especially the tense employed in, the permanence requirement is important. BL art.24(2)(4) requires persons claiming the status to "*have taken* Hong Kong as their place of permanent residence". This means that an applicant, at the moment of putting forward his claim for verification by the Director, is required to point to facts which have already occurred permitting him to say that he has, starting at some point in time prior to the making of his application, *already taken* Hong Kong as his place of permanent residence.
>
> 61. It is true, as Mr Joseph Fok SC, appearing with Mr Daniel Wan for the Director, pointed out, that the notion of taking Hong Kong as a person's place of permanent residence imports the quality of a past, present and future commitment to establishing and maintaining a permanent residence in Hong Kong. It nevertheless remains the case that BL art.24(2)(4) recognizes that all the facts necessary to satisfy the permanence requirement are capable of coming into existence weeks, months or even years before the date of

> the application so that in putting the application forward, the claimant is able to say: "I have taken Hong Kong as my place of permanent residence" since a date in the past."

38. Assuming for the moment that the application for verification of status was made in March 2006 but before 30 March 2006, the applicant had not by then been sentenced to imprisonment and in my judgment the provisions of section 67A of the Criminal Procedure Ordinance do not, *ex post facto*, alter that fact. The sentence commences on the date it is *imposed*. Section 67A of the Criminal Procedure Ordinance does not deem the sentence of imprisonment to have started from an earlier date, namely, the date of remand. And a judge does not have power to order a sentence to commence on some earlier date. Section 67 operates merely to treat the sentence passed as reduced: see *Chan Hung v Commissioner of Correctional Services* [2000] 3 HKC 767.

39. On the basis of my analysis of s.67A and since the residency status of an applicant is determined by the facts pertaining at the date of the application, it is not open to the decision-maker to conclude that an order remanding the applicant to custody prior to trial is a sentence of imprisonment within the meaning of section 2(4)(b) of the Ordinance.

40. I am far from asserting that a true state of affairs on a given date may not be ascertained by reference to matters coming to light after that date. Nonetheless, the subsequent conviction and section 67A do not turn the remand order into something it is not, namely, a sentence of imprisonment.

41. Insofar as reliance has been placed on the concept of an order *akin* to one of imprisonment pursuant to a sentence of a court, that is not the phraseology of the statutory provision pursuant to which provision the

impugned decisions were purportedly made. But, in any event, I am not content to conclude that such was the intention of the legislature.

42. There is an important presumption in favour of bail and the refusal of bail depends upon a host of circumstances which will vary from case to case, often nothing to do with a strong likelihood of conviction; and the refusal of bail will invariably mean a period in which the circumstances of the detainee's living conditions are involuntary. Yet that involuntariness cannot of itself for present purposes cause a break in what is otherwise ordinary residence, for if it did, the statutory provision would catch the very scenarios which Bokhary PJ categorised in *Fateh Muhammad* as outwith its contemplation. But, more particularly, the argument which permits *ex post facto* characterisation of the nature of the detention would enable, possibly require, the decision-maker in the face of an extant verification application, to delay his decision in order to await trial and its outcome and consequential appeals (and then, if there were an acquittal, to discount that period in custody); a scenario which is unlikely to have been in the legislature's contemplation.

43. And what if the applicant were convicted of a minor offence, one of several on an indictment or charge sheet, for the prospect of which conviction bail pending trial is unlikely to have been revoked? The possible permutations are many and although it may be said that this is not to the point, for each case and the nature of each period in custody falls to be examined on its facts, those considerations tend to reinforce my instinct that section 2(4)(b) should not be read so as to embrace a period of remand in custody pending trial.

44. The contrary view would, it seems to me, also give rise to anomalies. It would all depend on whether a particular applicant received or

was refused bail for, if on bail, section 2(4)(b) could not apply, although it could be argued, with some force, that the exclusionary circumstances specified by section 2(4) are not intended to be exhaustive; on which basis, I suppose, it might be suggested that certain conditions of bail would render residence out of the ordinary. But if bail without conditions were granted initially, then revoked, only to be restored, would the temporary period in custody upon revocation of bail break the continuity of ordinary residence? This would seem to run against the grain of *Fateh Muhammad*.

45. The suggestion was made, albeit not in any respondent's notice, that section 2(4)(b) apart, the common law principle of ordinary residence would defeat the applicant's claim to permanent residence because the common law would dictate that the period of incarceration pending trial could not possibly be said to constitute residence that was ordinary in nature.

46. The problem with this argument is twofold: first, the decision was made by the decision-maker on the basis of an interpretation of s. 2(4)(b) and, secondly, the legislature has chosen specifically to address the custodial circumstances which are to be taken as precluding ordinary residence, and it seems to me therefore to be difficult to widen that category by reference to the common law.

47. I would therefore hold that s. 2(4)(b) does not shut out an applicant by reason only of a period of remand in custody pending trial.

Prejudice

48. There can be no question but that the judge was correct in his conclusion that the applicant was not dealt with fairly in response to his letter of 14 February 2006.

49. The applicant had specifically raised the question of right of abode, yet he received no help in that regard. The reply letter told him only of the possibility of an extension of his permission to stay and the judge said:

> "56. It does not mean that the Director has to vet the person's status there and then. Nor does it mean that the Director has an onerous obligation to discharge when giving a reply. In my view, in the circumstances of the present case, a proper reply by the Director to the applicant would have been to give him general (standard) information on the requirement and procedure for making an application for verification of the status of a permanent resident, and to tell him that upon successful verification, he could apply to the Commissioner of Registration for the issue of a permanent identity card. A helpful letter of reply would have enclosed a copy of the standard form for making an application for verification. Or, the letter of reply could have referred to the appropriate web page where the form could be downloaded. Beyond that, on the facts of this case, the duty to act fairly does not require the Director to say or do anything.
>
> 57. On the facts, the Director was not entitled to wait until a follow-up letter from the applicant was received before advising him of the requirement and procedure for the making of an application for verification of his status. To suggest otherwise would be to put the cart before the horse.
>
> 58. For these reasons, I take the view that the Director has failed to act fairly, in relation to his statutory function to verify claims of the status of a permanent resident."

50. The question which next arises is whether the judge was correct to conclude that the applicant had established no prejudice.

51. The judge held that no prejudice had been established because the burden of proof, he said, was on the applicant to establish real prejudice and:

> "The undeniable fact is that notwithstanding the receipt of the 6 March 2006 letter, the applicant did nothing, that is to say, he did not even make an application for extension of his permission to stay, even though it was going to expire on 18 March 2006. In fact, as from 18 March 2006, the applicant became an overstayer, and he would not be regarded as ordinarily resident in Hong Kong by reason of section 2(4)(a)(ii) of the Ordinance."

52. It is, however, to be recalled that at the date upon which the applicant was treated unfairly, his ability in English was limited, he was in custody, as was known to the Director of Immigration and, as far as we are aware, was not represented in relation to his immigration status. The letter sent to him on 6 March 2006 was misleading and spoke only of a requirement to seek an extension of stay so as to avoid becoming an overstayer and one might have forgiven the applicant for thinking that whilst he was in prison the question of overstaying was hardly one that was going to be of concern to the immigration authorities. After the applicant was sent to prison for the offences in question, it is again not surprising that, unrepresented for immigration purposes, he took no immediate steps.

53. We should place ourselves in his position had he received proper advice on 6 March 2006 and, perhaps, an application form for verification of status as a permanent resident. He would then have had before him a form to complete and it seems to me right in the circumstances to assume that he would have availed himself of the opportunity to complete it. Such a form would have signalled the possibility of a status altogether more significant, in the circumstances in which he found himself, than mere permission to stay in Hong Kong.

54. I agree with the decision of the learned judge that the letter of 14 February 2006 is not realistically to be treated as an application for verification status but I am of the view that the appropriate conclusion in this case is to treat the application for that status, made in November 2006, as if made seven days after 6 March 2006.

Conclusion

55. On that basis, and given my conclusion as to the proper application of s. 2(4)(b), I would allow this appeal, set aside the orders of the court below, save as to taxation; set aside the decision of the Secretary for Security of 22 November 2007 to issue a deportation order; and his decision of 25 June 2008 refusing to rescind that order and direct the Director of Immigration to consider afresh the application of November 2006 for verification of permanent residence status as if made seven days after 6 March 2006, and to do so in accordance with the legal principles in relation to the remand period which I have adumbrated in this judgment. I would make an order nisi that the respondents do pay the applicant's costs here and below, and that there be legal aid taxation of the applicant's own costs.

Hon Fok JA:

56. I respectfully agree with the judgment of Stock VP. I add the following remarks out of deference for the learned Judge below, from whose judgment we are differing.

57. In *Fateh Muhammad v Commissioner of Registration & Anor* (2001) 4 HKCFAR 278, the Court of Final Appeal considered a challenge to the constitutionality of section 2(4)(b) of the Immigration Ordinance (Cap. 115) and decided (see per Bokhary PJ at p. 284F) that it was constitutional. The relevant part of Bokhary PJ's judgment addressing s.2(4)(b) is at pp. 283A-G which is set out in Stock VP's judgment at paragraph 31 above.

58. The basis on which the constitutionality of section 2(4)(b) was upheld in *Fateh Muhammad* was also succinctly explained by Ribeiro PJ in *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26 at §68 in these terms:

> "As this Court noted in *Fateh Muhammad v Commissioner of Registration & Another* (2001) 4 HKCFAR 278 at p. 283, provisions which exclude periods of imprisonment from qualifying as periods of ordinary residence have been on our statute books from 1971. It was held (*ibid*) that, provided one reads the word 'detention' in that section *ejusdem generis* with 'imprisonment' and therefore as applying only to detention in a training centre or in a detention centre, it was consonant with the ordinary and natural meaning of the words 'ordinary residence' to exclude periods of imprisonment from that concept. Section 2(4)(b) was therefore constitutionally valid." [Emphasis added]

59. The learned Judge below held that a period of remand in custody pending trial was not a period of "imprisonment" within the meaning of section 2(4)(b) (Judgment §23). For the reasons stated in Stock VP's judgment at paragraph 36 above, the Judge was correct to do so.

60. However, the Judge distinguished this case from that of *Fateh Muhammad* in that this was not a case in which a person was detained pending a trial which resulted in an acquittal or the dropping of charges (one of the examples referred to by Bokhary PJ in *Fateh Muhammad*) but rather was one about detention pending a trial, which resulted in a conviction and sentence of imprisonment (Judgment §24). He held (Judgment §37):

> "For all the above reasons, I conclude by way of interpretation of section 2(4)(b) that subject to the *de minimis* principle, a period of detention pending a trial, which results in a conviction and a sentence of imprisonment, is a period of "detention" pursuant to an order of the court, within the meaning of section 2(4)(b) of the Immigration Ordinance. Such a period is to be excluded in counting the period of seven continuous years of ordinary residence."

61. In light of the way in which the Court of Final Appeal has construed section 2(4)(b), and in particular the word "detention" in that provision, in *Fateh Muhammad* and *Prem Singh*, I do not think the Judge's conclusion that a period of detention pending a trial, which results in a conviction and a sentence of imprisonment, is a period of "detention" pursuant to an order of the court within the meaning of section 2(4)(b) can be supported. The word "detention" in section 2(4)(b) is confined to detention in a training centre or in a detention centre.

62. The applicant's period of remand in custody pending trial is not therefore to be discounted from his ordinary residence by reason of section 2(4)(b). Nor, for the reasons given by Stock VP in paragraph 44 of his judgment, do I consider that reliance on the common law principle of ordinary residence avails the Director.

63. So far as the remaining issues on the appeal are concerned, I also agree with the judgment of Stock VP and the orders he proposes.

Hon Lam J:

64. I agree with the judgments of Stock VP and Fok JA and there is nothing I wish to add.

Hon Stock VP:

65. Accordingly, the appeal is allowed and the orders of the Court below, save as to taxation are set aside. We set aside the decision of the

Secretary for Security of 22 November 2007 to issue a deportation order and his decision of 25 June 2008 refusing to rescind that order. We direct the Director of Immigration to consider afresh the applicant's application dated 14 November 2006 for verification of permanent residence status as if made seven days after 6 March 2006 and to determine that application in accordance with the legal principles stated in these judgments. There will be a costs order nisi that the respondent do pay the applicant's costs here and below, and that there be legal aid taxation of the applicant's own costs.

(Frank Stock) Vice-President	(Joseph Fok) Justice of Appeal	(M H Lam) Judge of the Court of First Instance

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

Ms Eva Sit of Department of Justice for 1st Respondent and 2nd Respondent