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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

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: 18 July 2008
Date of Further Judgment: 18 July 2008

F U R T H E R J U D G M E N T

Hon Tang VP:

1. In our judgment we said that we were minded to declare that the detention of the applicants were unlawful after the making of the convention claims. We also said that because we have heard no submissions on the wording of the actual declaration we should made, we would invite the parties to provide an agreed wording for the court's consideration. But after notice that our judgment would be handed down today was given, we were notified by the Department of Justice that the Director of Immigration ("the Director") may make some consequential applications upon the handing down of the judgment. They asked the

court if it could reserve 30 minutes for counsel for the Director to be heard in respect of such consequential applications, if necessary, shortly after the handing down of the judgment or at such earliest opportunity as they could be accommodated. Accordingly we notified the parties that we would hear counsel for the Director at 3.30 pm.

2. At the hearing, we were told by the parties that they have agreed the terms of the order which appeared on the document which has been handed up to us. I will not read out the terms of the declaration.

3. Mr. Anderson Chow, SC, appearing for the Director, asked for an interim stay of the effect of our judgment, pending an intended application for leave to appeal to the Court of Final Appeal. We were told that there are at the moment 387 persons who are subject to immigration detention under various sections of the Immigration Ordinance, Cap.115 ("the Ordinance"), amongst them 139 persons are torture claimants. Although our judgment only concerns the detention of persons who have made a torture claim, Mr Chow submitted that our judgment may have implications for all persons detained under the Ordinance particularly if they were detained under section 32. We were also told that unless the effect of our judgment is suspended pending appeal, it may be that persons who would pose a danger to our society will have to be released. But to our relief, we were also told by Mr Tam Yun-keung, an acting Assistant Principal Immigration Officer, in his intended affirmation, that since the hearing before us on 17 June 2008, the Director in consultation with the Secretary for Security, has reviewed his criteria on detention or recognizance. He has decided to begin implementation of the procedures which has been set out in some detail in his draft affirmation. It seems to

be the Director's case that when these procedures are implemented, it could be said that the policy and procedure for the detention of persons under section 32 of the Ordinance would comply with Article 5 of Hong Kong Bill of Rights. However, we are told that there is the practical problem of making the new policy accessible to the detainees.

4. Mr Philip Dykes, SC, for the applicants, submitted that no order staying the effect of our judgment should be granted. Nor would it have any effect since in the event of an application by any of the detainees for a writ of habeas corpus, a first instance judge would be bound by our decision. I have said that Mr Chow has asked that the effect of our judgment be suspended pending the intended application for leave to appeal, but he also mentioned during his oral submissions that the Director wished the declarations themselves to be suspended. But suspending the declaration will not suspend the effect of our judgment, so it is understandable why Mr Chow seemed to have acknowledged in his carefully prepared written submission that he is really asking us for a stay of the effect of our judgment.

5. He has referred us to the decision of Collins J in England in the case of *Saadi, Maged, Osman & Mohammed (R on the application of) v Secretary of State for the Home Department* [2001] EWHC Admin 670. There, Collins J made specific declarations relating to the illegality of the detention of the four applicants in the Oakington Reception Centre, but he granted a stay pending appeal. It is first to be noted that there was no discussion in that case as to whether the order should be stayed or the effect of the stay of the order. Nor was there any discussion as to whether

there was jurisdiction to make such an order. This is what was said in the exchange between the learned judge and counsel:

> "MR JUSTICE COLLINS: What you are concerned about, I suppose, is the prospect of all at Oakington applying to be released.
>
> MR GARNHAM QC: Absolutely.
>
> MR JUSTICE COLLINS: Well, I would have thought that that could be met, could it not, by the knowledge that no court would entertain those applications, or be likely to entertain those applications, pending the decision of the Court of Appeal.
>
> MR GARNHAM QC: In my submission, it is thoroughly unsatisfactory that the position should be unclear as a result of today's hearing when----
>
> MR JUSTICE COLLINS: I see the force of that, that it would be undesirable to leave it in the air, as it were, even though the likely result would be as I indicate.
>
> MR GARNHAM QC: And positively improper from the Home Office's point of view. Their task is not like an ordinary defendant in an action to wait until somebody sues them. They take a proactive approach to these matters.
>
> MR JUSTICE COLLINS: Yes, I follow that. On the other hand, I have to look at it from the point of view of the detainees, have I not, as well? Because if I am right then they should not be detained and liberty is really quite an important thing, is it not?
>
> MR GARNHAM QC: Absolutely, and that is why I have invited your Lordship to indicate that this matter is fit for expedition and why the Home Office have already made enquiries to the Court of Appeal Office."

6. Further down, Collins J asked counsel for the applicants whether he accepted that he had jurisdiction, and counsel appearing for them said: "I say nothing." But that they would not oppose a stay.

7. The learned judge made an order to hold the position pending appeal. This is what he said:

> "In those circumstances, as it seems to me, it would be difficult to say that I should stay the effect of the judgment; that is a somewhat meaningless approach. It seems that the right course is to stay the declaration. That means that the effect of the declaration will inevitably also be stayed and thus it cannot be assumed by anyone that the law is as I have stayed it to be until the Court of Appeal has had the opportunity of deciding whether that is correct."

And he made an order formally staying the declaration accordingly.

8. It is clear that the court has the power to stay an order and that includes the power to stay a declaration. But it seems to me that a stay would not make the judgment a non-judgment: as if it had never been made. I do not believe it is possible for this court to say that it should not be assumed that our judgment does not represent our view of the law. Of course it may be that the Court of Final Appeal will eventually overturn our decision, but in the meantime, our judgment must have effect as a judgment so far as our statements of the law and their implications are concerned.

9. Mr Chow has referred us to a decision of the Court of Final Appeal in *Koo Sze Yiu and Anor v Chief Executive of the HKSAR* [2006] 9 HKCFAR 441. In that case, the Court of Final Appeal ordered a suspension of the declarations of unconstitutionality so as to postpone their coming into operation for six months from the date of the judgment. But that is a different kind of situation completely. We can suspend the declaration but the suspension of the declaration in relation to the applicants here would not suspend the effect of our judgment as if it had never been delivered and I think that is a vital difference between the two. That being the case, I do not believe it would be right to grant an interim

stay of the effect of our judgment. The Director will have to ensure that those whom he believes would pose a danger to the society if released should have had made accessible to them the new policy and procedures.

Hon A Cheung J:

10. I agree.

Hon Barma J:

11. I also agree.

(Robert Tang)	(Andrew Cheung)	(Aarif Barma)
Vice-President	Judge of the Court of First Instance	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,
instructed by Messrs Barnes & Daly, assigned by Director of Legal Aid for 'F' and 'AS'

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