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HCAL 63/2011

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

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COURT OF FIRST INSTANCE

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CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

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NO. 63 OF 2011

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BETWEEN

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ZAMAN

Applicant

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and

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DIRECTOR OF IMMIGRATION

Respondent

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Before: Hon Lam J in Court

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Date of Hearing: 19 August 2011

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1. In this matter, Mr Zaman, the Applicant, applies for leave for judicial review to challenge the Director of Immigration's decision to execute a deportation order against him.

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2. The deportation order was actually made on 7 March 2007. It was made after the Applicant had been convicted of two counts of making false representation to an Immigration assistant, making a false representation to an Immigration officer, and breach of condition of stay. For those convictions, he had been sentenced to 6 months and 7 days' imprisonment.

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3. After the making of the deportation order, the Applicant lodged a claim under the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

4. He was released from imprisonment on 10 April 2007 since then he was released on his own recognisance, granted under Section 36(1) of the Immigration Ordinance.

5. The Applicant's torture claim was processed by the United Nations High Commissioner for Refugees, and it was refused on 19 January 2011.

6. In the meantime, on 22 October 2010, the Applicant started a claim in the District Court against the Director of Immigration. I understand that he was granted legal aid to pursue that civil claim, but I have not been shown the pleadings in that action. What I have got is a witness statement by the Applicant filed in the District Court action. He basically claimed damages in respect of his arrest, detention and treatment whilst he was in custody by the staff of the Immigration Department. The progress of the District Court action, according to the information given to me by the parties, is that pleadings have been closed. In July this year

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there were directions given by a Master of the District Court. The action was stayed until 14 September 2011 for parties to attempt settlement, including engagement in mediation. The Master also gave directions for exchange of witness statements and lists of documents, and there would be a case management conference on 3 January 2012. Accordingly, it appears that the case would not come on for trial until some time next year.

7. After the disposal of the Applicant's torture claim, the Immigration Department started to make preparation for the enforcement of the deportation order in terms of seeking the assistance of the Consulate-General of Bangladesh to facilitate the repatriation of him back to Bangladesh where he came from.

8. On 4 August 2011, the Consulate-General of Bangladesh issued a travel permit to facilitate the repatriation. The Applicant was informed by the Director of Immigration that his home passage had been arranged for 5 August, and he was advised to bring along his belongings to attend the Ngau Tau Kok Government Office for deportation.

9. In response, the Applicant requested the Director to withhold the execution of deportation order pending the resolution of his civil litigation in the District Court.

10. On 5 August 2011, the Director of Immigration replied by letter rejecting the request of the Applicant. On the same day, the Applicant took out an application for a writ of habeas corpus. Since the Applicant was still on his own recognisance at that time, viz. he was not detained, the court indicated that the proper course to take is for him to

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issue an application for leave for judicial review instead of applying for habeas corpus. Therefore, the Applicant issued a notice of application for leave to apply for judicial review on 8 August.

11. The matter came on for hearing on 12 August. At that stage, it was indicated on behalf of the Director that in terms of the progress of the civil litigation, the Director did not see any need for the continued presence of the Applicant to be in Hong Kong. It was said that if necessary the Applicant can apply to have permission to come back to Hong Kong when the case came on for trial to enable him to give evidence to support his case.

12. In relation to mediation, although there have been some discussions, counsel for the Director informed the court that there was no firm agreement as to the actual mediation. However, it was said that the parties have recently agreed on the choice of mediator. Given the fact that there has not been any firm arrangement as to mediation, the Director took the view that this should not be a matter which delayed the execution of the deportation order.

13. I was also told by counsel at that hearing that as far as general policy is concerned, the Director does not have a general policy to withhold enforcement of deportation order pending litigation except in cases where the deportation order itself is being challenged.

14. Under Section 54(1) of the Immigration Ordinance, there is a power to suspend a deportation order, and the power is delegated by the Chief Executive to the Secretary for Security. Counsel informed the court

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that as a matter of procedure, an applicant may write to the Director of Immigration to apply for such suspension, and the Director would then investigate into the matter and prepare a memorandum for the Secretary for Security to consider. I was told that there is no fixed policy and no set criteria, and much depends on the facts of the case. When an application is made on the ground that there is pending litigation, the Director will examine to what extent the subject needs to be physically present in Hong Kong in order to facilitate the prosecution of the litigation or the defence of the litigation.

15. In the present case, whilst a letter has been written on behalf of the Applicant by his solicitors in the District Court action seeking for the withholding of the enforcement of the deportation order pending the resolution of the District Court action, the letter did not explain why his physical presence in Hong Kong is necessary.

16. Be that as it may, as it transpired at the hearing on 12 August that parties were actively considering mediation, and with the agreement reached on the choice of mediator, it was reasonable to expect that mediation shall take place in the near future. In any event, according to the direction given by the Master in the District Court, that should take place before 14 September.

17. In the light of that, counsel very sensibly accepted that in the event of a mediation, the Applicant's presence in Hong Kong is necessary. However, the position remained as at 12 August that no firm arrangement had been made for a mediation.

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18. The Applicant has all along acted in person in the present proceedings. On 12 August, he indicated he needed time to sort out the situation with regard to mediation with his solicitors. This court acceded to his request for an adjournment, and the matter was adjourned to today.

19. Since that adjournment, there was further progress in the arrangement for mediation. Parties now agree that there will be a mediation on 12 September.

20. At today's hearing, Ms Cheung, on behalf of the Director of Immigration, offered an undertaking to the court that the Director, in order to facilitate the mediation in this particular case, will withhold the execution of the deportation order until 13 September or to a date where the case is settled if it is settled before the mediation. At the same time, Ms Cheung also informed the court the Director remains of the view that deportation order should generally be executed even though there are pending litigations.

21. Ms Cheung also reminded the court that deportation order was made in the first place on the basis that the continued presence of the subject in Hong Kong was not in the public interest. The subject of a deportation order had been convicted of deportable offences before a deportation order was made against him. In that respect, there is a difference between a deportation order and a removal order.

22. In the light of the undertaking from the Director, I agree with Ms Cheung that there is no basis to proceed any further with the judicial review in the present case. The only reason why, as far as I can see, based

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on the information before me at the moment, the Applicant should be allowed to remain in Hong Kong is the mediation. I agree with Ms Cheung's submission that the Director cannot be faulted for not having a policy that whenever there is litigation, whether litigation involving the Director or otherwise, there should be an automatic withholding of deportation order.

23. As indicated by Ms Cheung on the last occasion, there exists a mechanism for application to be made to the Director or to the Secretary for Security to withhold or to suspend a deportation order. But the mere fact that a subject is involved in civil litigation in Hong Kong cannot, by itself, be sufficient ground to support a suspension of a deportation order. There must be something more to explain why the presence of the subject in Hong Kong is necessary.

24. Participation in mediation can be a reason, but one must be alert to the possibility of mediation being put forward as a pretext or excuse. Therefore, in cases where there is evidence suggesting that the subject has no real intent to pursue mediation with good faith, the Director may still consider rejecting a request for suspension.

25. In the present case, it seems to me that is not the position of the Applicant. Therefore, the Director very sensibly agreed to withhold the enforcement of the deportation order in order to facilitate the mediation to take place on 12 September.

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26. In the circumstances, the situation has been resolved by the good sense of the parties. There is no need for the court's further involvement in the matter by way of judicial review.

27. I therefore agree that I should simply refuse leave, with the assurance that the Applicant can continue to remain in Hong Kong until 13 September so that he could take part in the mediation or the earlier settlement or his claim.

28. Although I refuse leave, the proceedings has achieved some purpose. What I propose to do is to make no order as to costs.

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

The Applicant, in person

Ms Leona Cheung, SGC, of the Department of Justice, for the Respondent