由此

HCAL 100/2006 and
10, 11 and 28/2007

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

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 100 OF 2006

BETWEEN

'A' Applicant

and

DIRECTOR OF IMMIGRATION Respondent

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 10 OF 2007

BETWEEN

'AS' Applicant

and

DIRECTOR OF IMMIGRATION Respondent

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 11 OF 2007

BETWEEN

‘F’ Applicant

and

DIRECTOR OF IMMIGRATION Respondent

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 28 OF 2007

BETWEEN

‘YA’ Applicant

and

DIRECTOR OF IMMIGRATION Respondent

(HEARD TOGETHER)

Before : Hon Hartmann J in Court

Dates of Hearing : 2 and 3 April 2007

Date of Handing Down Judgment : 15 June 2007

J U D G M E N T

Introduction

1. The 1984 Convention Against Torture applies to Hong Kong. I am informed that in March of this year some 860 persons, who were subject to deportation or removal orders under the Immigration Ordinance, Cap.115, had made claims under the Convention to the effect that, if returned to their countries, they would be tortured or killed. All of those claims await final determination.

2. The Immigration Ordinance confers a power to detain persons who are the subject of deportation or removal orders pending their removal from Hong Kong. The issue that arises in these consolidated applications goes to the lawfulness of continuing to detain such persons after they have made claims under the Convention Against Torture and are awaiting a final determination of their claims.

3. As I have understood it, three grounds of challenge have been raised. They may be broadly described in the following manner.

(i) The provisions of the Immigration Ordinance do not provide for the continued detention of the applicants after they have made claims under the Convention

4. Having made claims under the Convention, the applicants have a right not to be removed to the countries where they fear torture until their claims are determined. Such determinations, if lawful, invariably involve a long process, one that ensures that a claimant is dealt with fairly

while a painstaking factual investigation takes place. The determinations may take many months, indeed years. Orders of deportation or removal, however, impose upon the Director of Immigration or the Secretary for Security an 'immediate' obligation to effect physical removal from Hong Kong.

5. It is contended that an obligation to remove pursuant to the service of a deportation or removal order cannot co-exist with an open-ended obligation not to remove until the process of determining a claim under the Convention has been finalised. As Mr Dykes SC, leading counsel for the applicants, expressed it, the present provisions of the Immigration Ordinance are simply not equipped to deal with the expanding problem of claims made under the Convention Against Torture. The existing legislation has therefore impermissibly been stretched out of shape.

6. Mr Dykes said that, when there is a conflict between, on the one hand, the right of an applicant under the Convention not to be removed and, on the other hand, the immediate obligation imposed on Government pursuant to a deportation or removal order to bring about removal, the obligation to effect removal must give way to the right vested not to be removed. As such, therefore, when a claim is made under the Convention, applicable orders of deportation or removal lose their validity and must be set aside. It follows, of course, that if the orders themselves must be set aside, detention pending the execution of those orders cannot stand.

7. By an alternative route, Mr Dykes advocated his submission in the following way. If the detention of the applicants is pending their

deportation or removal to countries where they apprehend torture, their detention cannot be for the purpose of removing them to those countries because that is no longer possible, at least not until after their claims have been determined. Continuing detention must therefore be for some other purpose; namely, for the purpose of restricting their liberty until after their Convention claims have eventually been determined, a purpose not contemplated by the Immigration Ordinance.

8. The applicant, 'A', was the first to institute proceedings by way of judicial review seeking an order of *certiorari* to quash the decision of the Director of Immigration not to release him from detention. As it was integral to his challenge that, having made a claim under the Convention Against Torture, his order for removal no longer remained valid, he sought an order of *certiorari* quashing the removal order too.

9. The applicants, 'AS' and 'F', instituted their judicial review proceedings on the same date as each other, seeking the same remedies. As to their detention, they each sought a declaration to the following effect :

> "…the detention of the applicant by the Director of Immigration since …, as administered under section [32(3) or 32(3A)] of the Immigration Ordinance, Cap 115, is unlawful by virtue of not being a detention merely for the purposes of effecting his removal and such detention violates Article 5(1) of the Hong Kong Bill of Rights and Article 9(1) of the International Covenant on Civil and Political Rights ('the ICCPR')."

10. As to the orders requiring their physical removal from Hong Kong, they sought declarations to the following effect :

> "A declaration that the failure … to rescind the [deportation or removal] order … made against the applicant is contrary to the Government's duty to assess all claimants making a claim under the Convention against Torture."

11. 'YA' was the last to bring proceedings. He did so by way of *habeas corpus*. In his supporting affirmation, he set out the basis of his challenge in the following manner (in para.34) :

> "(1) I was detained by the Director of Immigration under s.32(3A) of the Immigration Ordinance, which authorizes detention 'pending removal' and for no other purpose …
>
> (2) However, as the letters from the Director … indicate, as long as the investigation of my torture claim remains ongoing, there will be no decision or specific plan as to my removal [being] effected.
>
> (3) At the moment, my torture claim is still being examined by the Immigration Department and there is no definite date by which such examination would be completed;
>
> (4) Therefore, my current detention is clearly not 'pending … removal' … but pending the determination of my torture claim. In other words, I am being detained for a purpose which is not authorized by law. There is no legal basis for my detention."

(ii) Continued detention is incompatible with art.5 of the Bill of Rights

12. Art.5 of the Hong Kong Bill of Rights is drawn from art.9 of the International Covenant on Civil and Political Rights ('the ICCPR'). Art.5(1) and (4) states that :

> "(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.
>
> (2) …

> (3) …
>
> (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."

13. The assertion that, having made a claim under the Convention, the detention of the applicants is inconsistent with art.5 of the Bill of Rights is founded on two grounds; namely —

(i) That neither judicial review nor *habeas corpus* provides an appropriate mechanism for determining the lawfulness of the applicants' continued detention; that is, its reasonableness in the sense of it remaining appropriate and just. This is because neither procedure enables the court to make a judgment based effectively on the merits of the detention.

(ii) That the continued detention of the applicants has not been lawful because the laws, rules and/or procedures under which they have been held are neither accessible nor precise and do not therefore guard against the risk of arbitrariness.

(iii) That, as to the length of detention, the period is unreasonable

14. What is or is not – in every case – a reasonable period of administrative detention is to be determined within the context of the limitations placed on the statutory power to detain pending removal. As was said by the Privy Council in *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1997] AC 97, at 111 :

> "Their Lordships have no doubt that in conferring such a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited. The principles enunciated by Woolf J in the *Hardial Singh* case [1984] 1 WLR 704 are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain 'pending removal' their Lordships agree with the principles stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time."

15. It is the assertion of the applicants that, applying what are now called the *Hardial Singh* principles, their periods of detention have been unreasonable.

Release from detention

16. It is important to record that, when the hearing commenced before me, all four applicants had either been released on recognisance or had secured bail. None remained in detention. But that being said, their freedom is not absolute. It remains circumscribed by the conditions of their recognisances or bail.

17. As to other claimants in detention, although the Director of Immigration has released on recognisance the great majority of them, I am informed that in March of this year about 130 claimants remained in custody. In addition, given the recent history of claims made under the Convention, it is almost inevitable that there will be more claims made by persons who are being detained pending their deportation or removal.

18. The issues raised in these consolidated applications are therefore of considerable importance. The right of an individual not to be held in detention except by authority of law is a fundamental principle of our law which applies to all persons including immigration detainees.

19. In the circumstances, aside from the public importance of the issues raised and the fact that, if not determined now, they will have to be determined in the near future, I am satisfied that the applicants, although now released from custody, retain their standing in respect of the different remedies sought by them.

Background

20. Each of the four applicants in these consolidated applications come from countries which in recent years, to a greater or lesser degree, have undergone periods of violent internal conflict. The applicant, 'A', is from Algeria. The applicants, 'AS' and 'F', are from Sri Lanka. The applicant, 'YA', is from the West African state of Togo.

21. Concerning the applicant, 'A', the evidence reveals that on 14 June 2006, while he was in administrative detention, he submitted a written request to be interviewed so that he could make a claim under the Convention Against Torture. In his letter he said he could not be returned to Algeria because he would be tortured or killed. A chop mark shows that the letter was formally received by the Immigration Department on the following day; that is, on 15 June 2006.

22. On 15 June 2006, without knowing that 'A' had submitted a request to be interviewed for the purpose of making a claim under the

Convention, the Assistant Director of Immigration signed a removal order pursuant to s.79(1)(b)(ii) of the Immigration Ordinance requiring 'A' to leave Hong Kong on the grounds that he had contravened his conditions of stay by overstaying for approximately two and a half years.

23. On 17 June 2006, a notice of removal was served on 'A'. The notice informed 'A' that his detention in custody had been authorised pending his removal to Algeria. That authorisation was in terms of s.32(3A) of the Immigration Ordinance.

24. In respect of 'A', the submission was made that the Director served a removal order on him *after* he had already made a claim under the Convention. In short, it was submitted that, at a time when the Director was under an obligation in law not to remove 'A' from Hong Kong, he served an order on him requiring his removal. It appeared to be suggested that, although not in contravention of any statutory bar, this amounted to an abuse of process. I do not agree. There was no evidence that it was intended as some sort of improper device. Nor, in my view, can it be said that, by making his claim before being served with his removal order, 'A' had a right in law not to be served thereafter with such an order and not to be detained pursuant to that order.

25. In respect of the remaining applicants, it is accepted that their claims under the Convention were made after they had been served with orders requiring their physical removal from Hong Kong.

26. As to deportation from Hong Kong, ss.20(5) and (7) of the Immigration Ordinance provide that :

> "(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.
>
> (6) …
>
> (7) A deportation 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."

27. As to removal from Hong Kong, s.19(1) of the Ordinance requires the person against whom an order is made to leave Hong Kong . S.19(4) is to the same effect as s.20(7), stating that :

> "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."

28. As to both deportation and removal, s.25 of the Ordinance makes provisions for how physical removal from Hong Kong to a 'specified country' may be accomplished. A 'specified country' is not only a country of a person's citizenship. S.2 of the Ordinance defines the phrase as meaning 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;"

29. In terms of the Ordinance, therefore, orders of deportation and removal are limited to requiring the person who is the subject of the order

to leave Hong Kong, his permission to remain being invalidated. The destination of that person may be to any 'specified country'. Accordingly, if it is established that, if returned to his country of citizenship, he faces a risk of torture, that person may be removed to another 'specified country'.

30. The Ordinance does not require that a deportation or removal order, once served, must immediately, or with a specified number of days, be executed. Under ss.54 and 55 of the Ordinance, the Chief Executive has the power to suspend a deportation order or to rescind it. The power to rescind does not effect the power to make a new order. There is no express power under the Ordinance to suspend or rescind a removal order. However, the Ordinance makes provision for an appeal against any removal order : see s.19(5). It also expressly prohibits the removal of a person until he is able fully to exercise his right of appeal.

31. In addition to being served with a deportation or removal order, the applicants in these proceedings were placed into administrative detention pending their physical removal from Hong Kong. The power to detain a person who is the subject of a deportation or removal order is provided for in the Ordinance. In this regard :

(i) In respect of deportation, s.32(3) says that :

> "A person in respect of whom … 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." [my emphasis]

(ii) In respect of removal, s.32(3A) is to the same effect. It says that :

> "A person in respect of whom a removal order … 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." [my emphasis]

32. A person who is detained pending his deportation or removal, may be released on recognisance : see s.36 of the Ordinance.

33. As to detention, therefore, it may only be for a single purpose; that is, pending a person's deportation or removal. In this regard, s.32 makes a number of provisions and one qualification :

" (3B) Subject to subsections (3C) and (3D), where—

(a) person is being detained pending his removal from Hong Kong; and

(b) a request has been made to the relevant authorities of a place outside Hong Kong by the Government for approval to remove the person to that place,

for the purposes of detention under subsection (1), (3) or (3A), 'pending removal' includes awaiting a response to the request from those authorities.

(3C) For the avoidance of doubt, nothing in subsection (3B) shall be interpreted as giving authority under subsection (1), (3) or (3A) to detain a person for a purpose other than pending his removal from Hong Kong.

(3D) For the further avoidance of doubt, nothing in subsection (3B) shall prevent a court, in applying subsection (4A), from determining that a person has been detained for an unreasonable period.

(4) Notwithstanding subsections (1), (1A), (2), (2A), (3) and (3A), a person who is to be removed from Hong Kong under section 18 or 13E or in respect of whom a removal order or a deportation order is in force may be detained—

(a) under the authority of the Secretary for Security for not more than 28 days; and

(b) by order of a court on the application of the Secretary for Justice for further periods, not exceeding 21 days upon any one application,

for the purpose of giving evidence at the trial of any offence or of facilitating inquiries into any offence or suspected offence.

(4A) The detention of a person under this section shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances affecting that person' detention including, in the case of a person being detained pending his removal from Hong Kong—

(a) he extent to which it is possible to make arrangements to effect his removal; and

(b) whether or not the person has declined arrangements made or proposed for his removal.

34. The one qualification that I have referred to earlier is under s.32(4). It is to the effect that a person may be detained for the purpose of giving evidence at a criminal trial or to facilitate investigations into an offence. Clearly, detaining a person for such purposes is unconnected to his removal from Hong Kong.

35. As My Dykes pointed out, there is no provision in s.32, or elsewhere in the Ordinance, which provides for the detention of persons pending the determination of their claims under the Convention Against Torture. He contrasted this with Part IIIA of the Ordinance which contains a detailed statutory scheme for Vietnamese refugees.

36. In respect of the four applicants, their claims under the Covenant were based on the following assertions :

(i) 'A' made a claim that, if returned to Algeria, he would be tortured because of past dealings with a revolutionary group adhering to Islamic fundamentalism.

(ii) 'AS', an ethnic Tamil, made a claim that, if returned to Sri Lanka, he would be tortured or possibly killed by business

associates who have connections with members of the Government.

(iii) 'F' made a claim that, if returned to Sri Lanka, he would be physically abused or possibly killed by the family of a deceased girlfriend, the family having connections with public officials and politicians.

(iv) 'YA' made a claim that, if returned to Togo, he would be tortured or possibly killed by the militia of a political party that he had opposed.

37. Art.3 of the Convention Against Torture – its full title being the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – states that :

> "1. No State Party shall expel, return ('refouler') 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.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

38. While the Convention Against Torture applies to Hong Kong, it has not been incorporated into domestic law. However, Government has adopted a policy which adheres to the safeguards provided by art.3 of the Convention. As to this policy, in an affirmation dated 28 March 2007, Mr Fung Ming Keung, an Assistant Principal Immigration Officer, said :

> "It is the policy of the Government not to remove a torture claimant to the place or country where he alleges that he will be tortured until after the determination of his torture claim. But

> that does not mean that the Director has no intention of removing, or is unable or unwilling to remove, the Applicant. All it means is that the Director, in the exercise of his discretion, decides to withhold the removal pending the determination of the torture claim."

39. As Mr Fung expressed it, each applicant in these proceedings has been detained pending his deportation or removal, subject only to the contingency that he may establish his claim under the Convention.

40. In its 1999 published guidelines on applicable criteria and standards relating to the detention of asylum seekers, the UNHCR said that, in its view, the detention of asylum seekers is 'inherently undesirable'. Detention should be a measure of necessity. As to the position of the Hong Kong Government concerning detention of asylum seekers, in a briefing paper dated 18 July 2006, the Government advised the Legislative Assembly Panel on Security and the Panel on Welfare Services that —

> "The fact that a person is a … torture claimant will not lead to that person's prosecution or detention in Hong Kong. However, a person who is found to be in violation of our laws may however be liable to such enforcement actions. For example, persons who have entered Hong Kong illegally or breached their conditions of stay may be so liable under our law.
>
> In the case of a person under detention in accordance with our laws who is also a … torture claimant, the Director of Immigration may on a case-by-case basis exercise his discretion to grant the person release on recognizance pending the determination of his claim …"

41. The problem, of course, is that the determination of a claim under the Convention, if it is to ensure the highest standards of fairness while ensuring a just result, cannot be achieved in a few days. As I have said earlier, claims are taking many months, sometimes several years, to

resolve. During the course of submissions, I understood that a period of two years was not unusual.

42. In its judgment in *Secretary for Security v. Prabakar* [2005] 1 HKLRD 289, at 303, the Court of Final Appeal held that, in considering a claim under the Convention from a person facing deportation or removal, high standards of fairness must be followed. This is to be done, first, by ensuring that a claimant, who has the burden of establishing that there are substantial grounds for believing he will be in danger if returned, is given every reasonable opportunity to establish his claim; second, by ensuring that the claim is properly assessed and, third, if the claim is rejected, by giving reasons that are sufficient to enable the claimant to consider the possibilities of administrative or judicial review.

43. In its judgment, the Court of Final Appeal gave guidelines as to relevant matters which should be taken into account in properly assessing a claim. These include (para.52) :

> "(1) The conditions in the country concerned: is there evidence of a consistent pattern of gross, flagrant or mass violations of human rights in that country? Has the situation changed?
>
> (2) Has the potential deportee been tortured in the past and how recently?
>
> (3) Is there medical or other independent evidence to support the claim of past torture?
>
> (4) Has the potential deportee engaged in political or other activity within or outside the country concerned which would make him vulnerable to the risk of being subjected to torture on return?
>
> (5) Is the claim credible? Are there any material inconsistencies? Is there any evidence as to the credibility of the potential deportee?"

44. Since the judgment in *Prabakar* there has been a startling increase in the number of claims made under the Convention by persons who are the subject of deportation or removal orders. From just a handful in 2005, the numbers have now increased, as I have said earlier, to some 860 claimants.

45. It would be naïve to think that all claimants are genuine. There will always be those who seek improperly to take advantage of the protections afforded by an international instrument such as the Convention. By way of illustration, as matters now stand, if a bad faith claimant secures his release on recognisance, he can expect to enjoy the opportunities provided to him in Hong Kong for well over a year. Tactical delays – for example, by not attending interviews – may increase that by several months. But, as against that, there will also be those who do have a genuine and rational fear for their future safety and for whom the protections afforded by the Convention offer their final hope of escaping the profound degradations that otherwise await them.

46. As to the determination of claims made under the Convention, this is achieved by way of an administrative process managed by and under the supervision of the Director. As to the nature of the administrative process, a three-page information document is given to all claimants. It explains the process of determination. It also makes plain that a determination favourable to a claimant will not bestow right of residence. In this regard, para.7 reads :

> "In cases where the determination is in the favour of the claimant, he is not automatically entitled to remain in Hong Kong. The Director may at any time order the claimant's removal/deportation/repatriation if in the Director's view the

> claimed threat of torture diminishes and protection under the Convention is no longer substantiated. If at that time, or at any time, a safe alternative country where the claimant will be received is identified, the claimant is likely to be removed or deported to that country."

47. The Government does not accept that art.3 of the Convention limits its ability in domestic law to execute deportation or removal orders but is content, it appears, to have its policy of adherence to the Convention treated as an enforceable legal duty. This position was clearly stated in *Prabakar* when the Court of Final Appeal made the following observations :

> " In exercising the power to deport, the appellant, the Secretary for Security has adopted the policy of not deporting 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. This policy in Hong Kong was stated in the report submitted by the People's Republic of China in 1999 under the Convention.
>
> The policy provides for the safeguard contained in art. 3(1) of the Convention Against Torture. Mr Pannick QC for the Secretary maintains that as a matter of Hong Kong domestic law, the Secretary has no legal duty to follow the policy. This is disputed by Mr Blake QC for the respondent. He argues that the Secretary is under such a duty on one of the following bases: the Basic Law, the Bill of Rights, customary international law and legitimate expectation. As the Court indicated at the outset of the hearing, it is unnecessary to decide this issue. For the purposes of this appeal, the Court will assume without deciding that the Secretary is under a legal duty to follow the policy as a matter of domestic law. In proceeding on the basis of such an assumption, the Court must not be taken to be agreeing with the views expressed in the judgments below that such a legal duty exists."

48. In respect of the present case, I do not see that it has become necessary to decide whether a legal duty exists in domestic law and, if so, its source. It is sufficient I believe that a legal obligation is accepted.

Does an order of deportation or removal lose its validity when a claim under the Convention is made?

49. I have earlier – in paras.4-6 – outlined the submission made on behalf of the applicants that, when a person, who is subject to a deportation or removal order, makes a claim under the Convention, his right not to be removed until his claim is determined, is in direct conflict with the obligation imposed by a deportation or removal order to bring about that claimant's physical removal. As Mr Dykes put it, the right not to be removed cannot co-exist with the obligation to remove. The right must prevail. Accordingly, the obligation must fall away which means that the order imposing the obligation must be rescinded.

50. I am unable to accept that submission. In my judgment, the provisions of the Immigration Ordinance are capable of accommodating both the right to make a claim under the Convention and the concurrent obligation imposed on the authorities to bring about the claimant's removal.

51. It is important, I think, to understand the fundamentals. When a claim under the Convention Against Torture is made by a person who is subject to an order of deportation or removal, that person is saying simply : "If you must remove me from Hong Kong, do not remove me to a particular country because in that country I am at substantial risk of being tortured and I have a right not to be placed in such danger". The Director, for his part, in recognising the claimant's right, is saying : "I still intend to remove you from Hong Kong. But, if I am satisfied that there is substance in your claim, then I will remove you to a country where you are

not at risk of torture or, if that is not possible, I will delay your removal until conditions change in the country where you are at risk."

52. In respect of the Director's position, in his affirmation of 28 March 2007, Mr Fung Ming Keung explained that, even if a claim under the Convention is established by a claimant, his physical removal from Hong Kong may still take place :

> "For a torture claimant who has established his claim, he will not be removed to the country where there are substantial grounds for believing that he would be in danger of being subjected to torture. However, his removal to another country to which he may be admitted without the danger of being subjected to torture will be considered. Furthermore, if subsequent changes in the relevant country's conditions are such that a torture claim established earlier in respect of that country can no longer be substantiated, removal to that country will be considered."

53. While the service of a deportation or removal order may impose an 'immediate' obligation to bring about the physical removal of the person who is the subject of the order, I read nothing in the Immigration Ordinance which imposes an obligation to bring about an 'immediate' removal. Indeed, the Ordinance plainly contemplates that it may not be possible to bring about immediate physical removal. By way of illustration, a person who is the subject of a deportation or removal order may be released on recognisance : see s.36. A deportation order itself may be suspended : see s.54. It is also provided that a person who is served with a removal order may appeal that order and may not be removed until all rights in this regard have been exhausted : see s.19(5). These provisions reflect legislative awareness of the fact that there may be reasons why, even though the intention remains to effect removal, it may not be possible to do so without delay.

54. In my judgment, in terms of the Ordinance, the purpose of a deportation or removal order is, of course, to bring about the physical removal from Hong Kong of the person upon whom the order has been served. But the legislative provisions both state and imply that the removal is subject to that person's legal rights and legitimate interests.

55. When I speak of 'legal rights', I speak not only of those rights provided for in the Ordinance but of broader rights to challenge the lawfulness of a deportation or removal order. For example, in addition to the right to appeal an order of removal, a person may institute judicial review proceedings which explore the legality of process bringing about the order including whether the decision to make the order was arbitrary. It speaks for itself, of course, that the exercise of such 'legal rights' may take up a considerable period of time.

56. When I speak of 'legitimate interests', I refer to any interest which on the part of the authorities it would be perverse or arbitrary to ignore. I refer, for example, if taken ill, to be suitably treated before being removed. I also refer, by way of further example, to the interest not to be returned to a country if current conditions in that country present a real danger because of civil war, famine or some similar catastrophe. Again, it speaks for itself that the recognition of such 'legitimate interests' may take up a considerable period of time.

57. How then is a claim under the Convention Against Torture to be classified? I do not think it matters whether it is classified as a legal right to challenge one possible manner of execution of an order or whether, because of the policy adopted by Government, it is recognised as

embodying certain legitimate interests. The result is the same. In my judgment, the exercise of the legal right or the recognition of the legitimate interest cannot, by that fact alone, itself strip the relevant order of its validity.

58. As I have indicated earlier, I do not see that a claim under the Convention constitutes a challenge to the lawfulness of a deportation or removal order, both of which require only a person's removal from Hong Kong. It seems to me to be a challenge going to the Director's powers under s.25 of the Immigration Ordinance to effect removal to a specified country. That being the case, I do not see how it can be said that the making of a claim under the Convention somehow strips a deportation or removal order of validity or somehow imposes a legal obligation to rescind such an order. But even if I am wrong in that regard, a challenge remains merely a challenge and does not of itself deprive an order of validity. Put simply, an order of deportation or removal remains valid until found to be otherwise by a court.

59. In this last respect, in *Thang Thieu Quyen and Others v. Director of Immigration* [1998] 2 HKLRD 179, the Court of Final Appeal looked to the lawfulness of the detention of certain persons under s.32(1)(a) of the Immigration Ordinance which then provided that : "A person who is to be removed from Hong Kong under section 18 or 13E … may be detained until he is so removed, …" The persons detained had instituted judicial review proceedings to challenge the lawfulness of their removal orders. It was argued on their behalf that, as their removal was now no longer imminent, they could not lawfully be detained under s.32(1)(a). The Court disagreed. It held as follows :

> "*There are valid removal orders under section 13E(1). True it is that the removal orders are under challenge, leave to apply for judicial review having been granted. But they remain valid unless and until successfully challenged.* That being so, the applicants can be lawfully detained under section 32(1)(a) as persons who are to be removed from Hong Kong under section 13E." [my emphasis]

The court went on to say :

> " The current detention is for a period necessary to effect removal. Removal is possible within a reasonable time and it is not alleged that the Director has failed to take reasonable steps to ensure that that will be done. Indeed, the Director wishes to and is able to implement the removal orders and there is no practical obstacle to removal … What has held up removal is the judicial review challenge by the applicants and not any act or omission on the part of the Director."

60. This, however, does not finally determine the matter. As I understood Mr Dykes, it was his contention that, in terms of the Immigration Ordinance, the determination of a claim made under the Convention amounts to determining whether the claimant may or may not stay in Hong Kong pursuant to the provisions of s.11 of the Ordinance.

61. In this regard, ss.11(1A) and (2) of the Ordinance provide :

> " (1A) An immigration officer or immigration assistant may, on the examination under section 4(1)(b) of 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, give such person permission to remain in Hong Kong but an immigration officer only may refuse him such permission.
>
> (2) Where permission is given to a person to land or remain in Hong Kong, an immigration officer or immigration assistant may impose—
>
> (a) a limit of stay; and
>
> (b) such other conditions of stay as an immigration officer or immigration assistant thinks fit, being

conditions of stay authorized by the Director, either generally or in a particular case."

62. So that the statutory scheme may be understood in context, s.4(1)(b) of the Ordinance reads :

> " For the purposes of this Ordinance, an immigration officer or immigration assistant may—
>
> (a) …
>
> (b) examine a person at any time if he has reasonable cause for believing that such person is contravening or has contravened a condition of stay in respect of him, or remains in Hong Kong without the permission of an immigration officer or immigration assistant …"

63. A claim made under the Convention, said Mr Dykes, being, in terms of the Ordinance, a claim under s.11, cannot be regarded as any sort of claim going to whether the claimant should be removed from Hong Kong. To the contrary, it was for the purpose of determining whether he should be allowed to remain.

64. I do not agree. In my judgment, as I have indicated earlier, a claim under the Convention does not go to the lawfulness of a deportation or removal order, it goes rather to the lawfulness of the manner of execution of such an order pursuant to s.25 of the Immigration Ordinance. A claim under the Ordinance is not a claim to remain in Hong Kong, it is a claim not to be removed to a particular country while conditions continue to prevail in that country which place the claimant at risk of torture.

65. In the circumstances, I do not accept that the deportation or removal orders served upon the four applicants either lost their validity in

law or fell to be rescinded by the Director of Immigration by the mere fact that the applicants lodged claims under the Convention Against Torture.

Does a claim under the Convention change the purpose for continued detention, one that is not within the contemplation of the Ordinance?

66. Under ss.32(3) and (3A) of the Ordinance, a person may only be detained 'pending his removal from Hong Kong'. If a statutory power is conferred for a purpose, it may only be exercised for that purpose. Mr Dykes submitted that, having made their claims under the Convention, the applicants' continued detention could no longer be for the purpose of removing them from Hong Kong but had to be for some other purpose, a purpose not contemplated by the Ordinance.

67. How then is the phrase 'pending his removal from Hong Kong' to be interpreted? In that phrase, the word 'pending' is employed as a preposition. As such, the Shorter Oxford English Dictionary (5th Ed.) defines it as meaning 'until' or 'while awaiting'.

68. That certainly was the meaning given to the word by Kaplan J, as he then was, in his 1991 judgment in *Bu Xue Bun v. Director of Immigration* [1991] 2 HKC 609. The facts of the case are simple enough. On 9 December 1991, the applicant flew into Hong Kong. She was arrested and charged with immigration offences including use of an unlawfully obtained travel document. Two days later, on 11 December 1991, she was served with a removal order and an order for her detention issued under s.32 of the Immigration Ordinance 'pending removal'. The following day, on 12 December 1991, the applicant pleaded not guilty before a magistrate to the criminal charges brought against her and was

given a trial date of 28 January 1992. The applicant brought *habeas corpus* proceedings. It was contended that detention under s.32 was intended only for temporary detention, pending removal, but that the order was now being used for long-term detention and was therefore unlawful. Kaplan J rejected the argument :

> "It seems to me that s 32 must be intended to cover situations like this because if it was not, one would have an extremely absurd situation that by merely pleading not guilty and putting off the day on which the case would come on, people would be able to argue that s 32 did not cover them, and they could not be detained under that section. I do not think that is what the legislature had in mind and I am quite satisfied that s 32 is intended to detain people *until* they are to be removed. This lady will no doubt be removed when her criminal case has been determined." [my emphasis]

69. In the later case of *Chieng A Lac and Others v. Director of Immigration* (1997) 7 HKPLR 243, at 254, Keith J, as he then was, came to the same conclusion. In that judgment, he was looking to the use of the phrase in s.13D(1) of the Immigration Ordinance, a section concerning Vietnamese asylum seekers :

> "Ms. Li argued that since the power [of detention] is exercisable 'pending [the asylum-seeker's] removal from Hong Kong', the power cannot be exercised for any purpose other than to facilitate his removal from Hong Kong. This argument assumes that the words 'pending [the asylum-seeker's] removal from Hong Kong' mean 'in order to facilitate the asylum-seeker's removal from Hong Kong'.
>
> This is where I find myself in fundamental disagreement with Ms. Li's argument. In my view, the purpose of the power of detention was not to facilitate the asylum-seekers' removal from Hong Kong, but to ensure that they remained in detention while attempts were made to effect their removal from Hong Kong. In other words, I read the words 'pending [the asylum-seeker's] removal from Hong Kong' as meaning 'until the asylum-seeker's removal from Hong Kong."

70. I agree with Keith J. The phrase 'pending his removal from Hong Kong' means 'until his removal from Hong Kong' or 'while awaiting his removal from Hong Kong'.

71. I have earlier referred to the judgment of the Court of Final Appeal in *Thang Thieu Quyen and Others v. Director of Immigration* in which the Court held that an order of removal remains valid until successfully challenged. That being so, detention authorised pursuant to that order remains valid too.

72. I accept, of course, that, as matters stand, individual claims under the Convention are, by and large, taking a considerable period of time to be determined. But that is not to say that all claims inevitably are taking a considerable period. I do not see therefore that any general rule can be drawn from difficulties encountered in individual cases, even if they amount to the majority of cases.

73. In *R (on the application of I) v. Secretary of State for the Home Department* [2002] EWCA Civ 888, Simon Brown LJ said the following :

> "That a prolonged period of detention pending the final resolution of an asylum claim is sometimes permissible cannot be doubted: *Chahal -v- United Kingdom* (1996) 23 EHRR 413 illustrates the point well. The applicant was a Sikh separatist leader detained in custody for the purpose of deportation for some 3½ years (until the House of Lords' final refusal of leave to appeal). The reason for his long detention pending removal, however, was because the Secretary of State regarded him as a threat to national security; but for his asylum claim there would have been no difficulty in returning him; on the contrary, the Indian government were anxious to secure his return.

> What *Chahal* illustrates is that a detained asylum seeker cannot invoke the delay necessarily occasioned by his own asylum claim (and any subsequent appeal(s)) to contend that his removal is clearly 'not going to be possible within a reasonable time', so that he must be released."

74. Removing those observations into the present context, it seems to me that a claimant under the Convention cannot invoke the fact that the claim must be investigated to contend that he is therefore no longer being held pending his removal and must be released.

75. The following, in my view, may be drawn from these authorities :

(i) In terms of the statutory scheme, 'pending removal' is not to be read as meaning detention for a limited period for the single purpose of facilitating removal. It is to be read more broadly as meaning that a person who is the subject of an order of deportation or removal may be detained until he is removed or while he awaits his removal.

(ii) By providing that a person may be detained until or while awaiting his removal, the legislature has recognised that there may be reasons why removal may have to be delayed.

(iii) A challenge or claim under law is one of those reasons.

(iv) But a challenge or claim of itself does not invalidate an order of deportation or removal. The order remains valid unless successfully challenged and an order of detention pursuant to it remains valid too.

(v) If an order of deportation or removal remains valid, it means that the purpose of the order pursuant to the Immigration Ordinance remains unchanged. That purpose is to bring

about the physical removal of the person who is the subject of the order.

(vi) That being the case, an authorisation to detain remains for the same purpose; namely, so that the person may be held until or while awaiting his removal.

76. In summary, even though a claim under the Convention has been made, if the Director still intends to effect the removal of a claimant, the only contingency being the date and manner of that removal, then, in my view, detention remains for the purpose of effecting removal.

77. I therefore reject the contention that the making a claim under the Convention by a person who is detained pending his removal changes the nature of his detention and, by that change, becomes unlawful.

78. It may be, of course, that in individual cases a person is held for a period of time that, in the circumstances, becomes unreasonable and therefore, having regard to the *Hardial Singh* principles, unlawful. But that is a different issue, one to which I shall now turn.

Once a claim under the Convention is made, is continued detention incompatible with art.5 of the Bill of Rights?

79. Art.5(4) of the Bill of Rights provides that :

> "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."

80. Art.5(4) requires therefore that a person held in detention pending his removal from Hong Kong has the right to appear before a court so that the court may, without delay, review the lawfulness of his detention and, if it is found not to be lawful, order his release.

81. 'Lawfulness' in this context means more than simply in accordance with the letter of statutory provisions. It includes broader concepts, one being the concept of arbitrariness. As such, administrative detention which is inappropriate and/or unjust is unlawful.

82. Equally, detention which does not accord with the *Hardial Singh* principles of reasonableness is unlawful. As Auld LJ put it in *R (on the application of Q) v. Secretary of State for the Home Department* [2006] EWHC 2690 (Admin), 'lawfulness' in this context is to be informed by 'the case-sensitive consideration of reasonableness in all the circumstances'.

83. The importance of the *Hardial Singh* principles has been stated in the clearest of terms by Keith J in *Chieng A Lac v. Director of Immigration (supra)*, page 274 :

> "The *Hardial Singh* principles constitute the checks and balances recognised by our system of law to prevent abuse of the exercise of a statutory power of detention. Indeed, the *Hardial Singh* principles are far wider than the limited power to grant immigration parole conferred on the Attorney-General of the United States. The *Hardial Singh* principles represent a comprehensive and coherent code for ensuring that the detention of an asylum-seeker is not, and does not become, arbitrary. They also represent a sufficient and satisfactory regime for determining whether, by reason of its length and purpose, the detention of an asylum-seeker in Hong Kong amounts to cruel, inhuman and degrading treatment."

84. An example of the practical application of the *Hardial Singh* principles is to be found in the judgment of Godfrey J, as he then was, in *Liew Kar Seng v. The Governor-In-Council* [1989] 1 HKC 215. An order of deportation was made requiring Mr Liew to be removed from Hong Kong. It was believed that he was a Malaysian citizen and that Malaysia would accept him. However, the Malaysian authorities did not accept that he was a citizen. An impasse was reached. Having been in detention pending his removal since 31 October 1988, on 10 December of that year Mr Liew applied for a writ of *habeas corpus* and for judicial review. Godfrey J granted the writ of *habeas corpus*, saying :

> " A power to detain a person who is the subject of a Deportation Order 'pending his removal' from Hong Kong means just that. If the authorities say: 'we will not remove the detainee' or 'we cannot remove the detainee' or 'heaven knows when we will be able to remove the detainee' then, in my judgment, they cease to hold the detainee 'pending his removal' and the court can and should intervene to secure his release from detention.
>
> But if the authorities say 'We are sorry; we cannot remove you just at the moment but we are doing our best to do so' then, in my judgment, they continue to hold the detainee 'pending his removal'; and the court cannot and should not intervene unless it considers that there is no real prospect of the authorities ever succeeding within what, in all the circumstances of the case, the court considers a reasonable time, in deporting the detainee. It will occasionally happen that the best that the authorities can do is simply not good enough. If, after what, in all the circumstances of the case, is a reasonable time, the suthorities have tried their best and failed, the matter cannot be allowed to rest there; for otherwise the detainee could remain in detention indefinitely, even for the whole of the rest of his life. No civilized system of jurisprudence could permit that. The power of detention is given to the immigration authorities only in order to enable the machinery of deportation to be carried out; and (like Woolf J in *R v Governor of Durham Prison, ex parte Singh* [1984] 1 All ER 983) I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose."

85. Godfrey J continued by saying :

> " In my judgment, once the authorities have had what, in all the circumstances of the case, is a reasonable time to resolve the matter, and yet (even though it be through no fault of theirs) the matter remains unresolved, then the detainee must be entitled to be released. This conclusion is dictated, as it seems to me, by an elementary understanding of the fundamental human rights of any individual in any civilized society, without any need to pray in aid any man-made law, whether national or international, valuable though such laws are as a protection against the abuse of power."

86. The first challenge by Mr Dykes is to the effect that the only means open to the applicants to seek a review of the lawfulness of their detention is by way either of judicial review or *habeas corpus*, neither procedure, however, providing an appropriate mechanism for determining the lawfulness of the applicants' continued detention; that is, its reasonableness in the sense of it remaining appropriate and just. As I have understood Mr Dykes, this is essentially because neither procedure enables the court to make a judgment based effectively on the merits of the detention as opposed to its broader legality.

87. In my judgment, however, without going into jurisprudential complexities as to how complete *habeas corpus* and judicial review may be, I believe that these two parallel jurisdictions are capable of adequately meeting the requirements of art.5(4) of the Bill of Rights. Indeed, although the decision of Godfrey J in *Liew Kar Seng v. The Governor-In-Council* came before the Bill of Rights, it is, in my view, a good practical example of how rights under art.5(4) are protected.

88. As a broad guide, *habeas corpus* is to be used when the challenge is to the power to detain and to its continuing lawfulness; for

example, whether it accords with the *Hardial Singh* principles. Judicial review is to be used when the challenge goes to broader administrative decision-making which involves the exercise of discretion after weighing relevant factors.

89. I emphasise that the power of the courts is not limited to considering whether detention accords with statutory requirements and is lawful by that measure. The power is vested in the courts to consider the lawfulness of detention in accordance with the broader definition that I have spoken of. In short, if detention is found to be arbitrary or is found not to be reasonable in accordance with the *Hardial Singh* principles then it will be ruled unlawful.

90. I would observe that, in my judgment, what is arbitrary and what is unreasonable according to the *Hardial Singh* principles are in many respects very similar concepts, merging into each other. By way of illustration, in *Fok Lai Ying v. Governor-In-Council* [1997] 3 LRC 101, at 112, Lord Cooke cited with approval a decision of the United Nations Human Rights Committee to the effect that a remand in custody pursuant to lawful arrest, if it was not to be arbitrary, had to be 'reasonable in all the circumstances'.

91. As to the standard by which the lawfulness of detention is to be judged, I am satisfied that, with the liberty of the subject at stake, the courts must act as primary decision-makers, taking into account all relevant circumstances.

92. In this regard, in *Youssef v. Home Office* [2004] EWHC 1884, Field J rejected the contention that the standard by which the legality of administrative detention should be judged is the *Wednesbury* standard. He held that, in determining the lawfulness of such detention the court had to be the primary decision-maker :

> "Whilst it is a necessary condition to the lawfulness for Mr. Youssef's detention that the Home Secretary should have been reasonably of the view that there was a real prospect of being able to remove him to Egypt in compliance with Article 3 ECHR, I do not agree that the standard by which the reasonableness of that view is to judged is the *Wednesbury* standard. I say this both because I can find nothing in the judgment of Woolf J. in *Hardial Singh* that points to this being the standard and because where the liberty of the subject is concerned the court ought to be the primary decision-maker as to the reasonableness of the executive's actions, unless there are compelling reasons to the contrary, which I do not think there are. Accordingly, I hold that the reasonableness of the Home Secretary's view that there was a real prospect of being able to remove Mr. Youssef to Egypt in compliance with Article 3 ECHR is to be judged by the court as the primary decision-maker, just as it will be the court as primary decision-maker that will judge the reasonableness of the length of the detention bearing in mind the obligation to exercise all reasonable expedition to ensure that the steps necessary to effect a lawful return are taken in a reasonable time."

93. In *R (Karas) v. Secretary of State for the Home Department* [2006] EWHC 747 (Admin), Munby J adopted the reasoning of Field J.

94. The foundation of the reasoning of both Field J and Munby J is not to be found in jurisprudence of the European Court but in the common law principles enunciated by Woolf J in *Hardial Singh*, principles accepted as being part of Hong Kong law.

95. I would add that the English Court of Appeal appears also to have adopted a higher standard for determining the lawfulness of continuing administrative detention. In *R (on the application of Q) v. Secretary of State for the Home Department*, Auld LJ held that, in looking to the lawfulness of continued detention, the court was required to make a value judgment, taking into account 'the length, circumstances and reasons' for the detention. He continued by saying :

> "Whatever the appropriate form of remedy to enable the Court to do justice in balancing the interests of the liberty of the subject and the national interest in a case such as this, the Court should no doubt form its own view on *Hardial Singh* lines whether, at the date of its decision on 3rd October, this detention, is no longer lawful in the sense of being reasonably required to secure Q's removal from the country."

96. This is not to say, of course, that the reasons of the decision-making authority going to why continued detention has been authorised are not to be given due weight. Indeed, having regard to all the circumstances, a significant margin of discretion may have to be given to the decision-making authority. In *Youssef v. Home Office*, Field J recognised that —

> "… when applying the approach I hold to be the correct one, the court ought in my opinion to have regard to all the circumstances and in doing so should make allowance for the way that government functions and be slow to second-guess the Executive's assessment of diplomatic negotiations."

97. The second contention of Mr Dykes went to the provisions of art.5(1) of the Bill of Rights, specifically to the guarantees that a person may not be subject to arbitrary detention and that there will be no

deprivation of liberty except in accordance with procedures established by law.

98. Art.5(1) provides that :

> "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."

99. Mr Dykes submitted that, if detention was to avoid the risk of being arbitrary, it had to be based on a rational, precise and accessible 'policy' of detention. He contended that, in detaining the applicants, the Director of Immigration had no such policy.

100. As to what is arbitrary, it is now well settled that it does not mean only 'against the law'. It must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

101. In the New Zealand authority of *Neilsen v. Attorney-General* [2001] 3 NZLR 433, at para.34, the term arbitrary (in respect of arrest and detention) was defined in the following terms :

> "Whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures."

102. In another New Zealand authority, *Manga v. Attorney-General* [2000] 2 NZLR 65, at para.44, this definition was qualified by saying that :

> "lawful detentions may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality"

103. As to the requirement that, to avoid detention being arbitrary, it had to be based on a rational, precise and accessible policy, Mr Dykes made reference to the judgment of the European Court of Human Rights in *Amuur v. France* (1996) ECHR 25 in which the Court said the following (at page 50) :

> "In laying down that any deprivation of liberty must be effected 'in accordance with a procedure prescribed by law', art.5-1 primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law … they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. 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 … particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies."

104. In his submissions, Mr Dykes spoke of a 'policy' of detention, the suggestion at times being to the effect that there should be a published policy document akin, for example, to the 'Operation Enforcement Manual' published by the immigration authorities in the United Kingdom. A failure to publish such a document, it was suggested, meant that detainees were denied access to knowledge of the determining principles

upon which their detention was based and the procedures governing it. That in turn rendered their detention arbitrary.

105. In *Ammur v. France*, however, the European Court did not speak of the requirement for a published policy document. It spoke of the need to examine domestic law and 'other legal rules'.

106. Mr Dykes also made reference to the judgment of the English Court of Appeal in *Nadarajah v. Secretary of State for Home Department* (2003) EWCA Civ 17688. But the ratio of that judgment, as I have read it, is that, having published a policy concerning the detention of immigration detainees, the Secretary of State may not 'move the goalposts' by applying some aspect of the policy that is not published. In this regard, the Court of Appeal said :

> "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 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."

107. While I accept that the law, and legal rules made under it, must be adequately accessible, I do not see that this requirement obliges the Director to publish a detailed policy document.

108. It may, of course, be beneficial to do so, both for the immigration authorities and claimants under the Convention. It may give guidance to both parties, ensuring that both are aware of their obligations. A Convention claim after all does not create a one-sided responsibility. Just as the immigration authorities must act vigorously and fairly so that a just determination is made within a reasonable period of time so must claimants give their active co-operation to ensure that this is possible. The ideal may therefore be to publish a policy document so that both parties know where they stand. But I am not concerned with what is the ideal. I am concerned with what is sufficient to meet the requirements of law.

109. In considering the issues raised by Mr Dykes, it is necessary to place the circumstances of the applicants into context. First, each was served with a lawful order of deportation or removal. Second, each was detained pending his removal pursuant to the provisions of the Immigration Ordinance. Third, each made a claim under the Convention saying that if returned to a particular country he was at risk of being tortured.

110. As to their position in law, I have in this judgment concluded that the applicants' Convention claims did not invalidate the applicable orders of deportation or removal. Nor did it change the nature of their detention; they remained detained pending their removal in accordance with the provisions of the Ordinance.

111. As to the issue in contention; that is, whether the detention of each of the applicants was inconsistent with their guaranteed protections

under art.5(1) of the Bill of Rights and was arbitrary, I am satisfied that it was not inconsistent with their rights under art.5(1) and was not arbitrary. In coming to this conclusion, I have taken the following factors into account :

(i) The detention of the applicants had a clear basis in domestic law; namely, the relevant provisions of the Immigration Ordinance.

(ii) The power of detention conferred by the Ordinance is circumscribed. I have earlier looked to the manner in which it is circumscribed.

(iii) The exercise of the power of detention under the Ordinance must not only be in accordance with the terms of the Ordinance but must be in accordance with what the European Court has described as 'the rule of law'. The legislative intent is that the power of detention must be exercised reasonably.

(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.

(vi) The courts have the power to review the conditions of detention to be assured that they are 'reasonable in all the circumstances' : see *Fok Lai Ying v. Governor-In-Council (supra)*.

(vii) All orders of detention were served on the applicants so that they were aware of the provisions of the Immigration Ordinance under which detention was authorised. In addition, in making their claims under the Convention, the applicants were served with an information text explaining the process that lay ahead and what the Director considered their status to be in light of their claims. If the applicants wished to challenge the lawfulness of their detention – as they have done – they therefore had open to them sufficient information.

(viii) In any event, detention, once authorised, is not absolute. Claimants may be released on recognisance. Indeed, the evidence reveals that the great majority have made applications to be released and have been released. The evidence reveals that the applicants were themselves aware of the right to seek release on recognisance.

112. In light of these matters, I fail to see how it can be said that the laws, rules and procedures governing the detention of the applicants are devoid of adequate determining principles, are unjust or lack predictability. I also fail to see how it can be said that they are not accessible.

Has the period of detention of each applicant been unreasonable?

113. The *Hardial Singh* principles direct that the Director may only detain a person who is the subject of a deportation or removal order for that period of time which, in the circumstances of the case, is necessary to effect removal. When a claim under the Convention is made, the circumstances dictate that a period of time must be allowed for

determination of that claim. The real issue, it seems to me, is what is to be considered an appropriate; that is, reasonable, period of time.

114. I say that because, in accordance with the *Hardial Singh* principles, if it becomes clear to the Director that physical removal from Hong Kong is not going to be possible within that time then, as the law stands, further detention is not authorised. A claimant must be released.

115. In my judgment, it is not possible to set down some bright line figure – for example, six months from the date of making a claim – and to say that, whatever the circumstances, all claimants whose claims have not been finalised by that date must be released.

116. To do so, in my view, would invite an abuse of the system. Immigration officers, knowing it may be impossible to determine a claim in that period, will be tempted not to act with due vigour to meet a deadline which is unobtainable. Bad faith claimants will know that, if they prevaricate long enough, however, vexatious their claim, they will be allowed back into Hong Kong society.

117. In any event, each and every claim is unique just as the circumstances of each and every claimant are unique. Accordingly, what is a reasonable period of time is to be judged in respect of each case according to the particular circumstances of that case.

118. In exercising his discretion whether to continue detention or to authorise release, the Director must take into account a wide range of matters. Clearly, one of the principal matters will be the progress of a

claim made under the Convention. If the claim has been decided or is very close to decision, that may well be a determining factor. Removal then will be imminent. If the claim has not progressed because, despite best attempts, it has not been possible to obtain relevant information from outside of Hong Kong and it appears that it will not be possible to obtain that information in the near future, that too may be a determining factor, one that points towards immediate release. Equally, however, if a claimant, in the view of the Director, has been refusing to co-operate in forwarding a claim, that too may be a consideration of importance, especially if it is allied to the fact that the claimant has a history of disregard for Hong Kong's immigration laws and procedures. In summary, whether a claimant should or should not be released at a particular period of time, is a decision which must, to a greater or lesser extent, be influenced by the progress of a claim and factors influencing that progress.

119. The difficulty that I have faced in respect of each of the applicants is that, frankly, insufficient relevant information was placed before me to enable me to come to a decision in accordance with the *Hardial Singh* principles. As I have said earlier, by the time the hearing commenced, all of the applicants had been released from detention, either on bail or on recognisance. That being the case, the immediacy of determining the lawfulness of continued detention fell away. Mr Dykes, for example, concentrated on the issues of law which were presented rather than on the factual circumstances going to each individual applicant. In light of the fact that all of the applicants were released from detention, the issue of the lawfulness of their detention became one to be viewed historically; that is, by determining, with regard to all relevant historical

factors, whether, at any point in time prior to their actual release, if the Director acted lawfully, he should have authorised their release.

120. I have spent a considerable period of time considering the factual situation of the applicants. I am simply not in a position, however, to come to any clear determination as to whether any period of their detention was unlawful by being unreasonable in all the circumstances. To be able to come to such a determination, further information will have to be placed before me, especially information going to the progress of the applicants' claims. Further argument will then be required. As matters stand, I am not prepared to come to a finding that any of the applicants were, or were not, unlawfully detained for any specific period of time and, if unlawfully detained, are entitled to damages.

121. Obviously, the applicants having all obtained their release when the hearing commenced before me, no purpose is served in making the orders that were sought requiring their release.

122. In the circumstances, if any of the applicants seek a ruling that they were for any period of time unlawfully detained and are entitled to damages, that will have to be determined in further proceedings. If required, relevant directions will be given in that regard.

Conclusion

123. For the reasons given in this judgment, I make the following orders in respect of the four applications.

124. ‘A’ :

(i) The application for an order of *certiorari* to quash the removal order dated 15 June 2006 is dismissed.

(ii) The application for an order of *certiorari* to quash the decision of the Director dated 17 June 2006 to continue detaining ‘A’ even though a claim had been made under the Convention is dismissed.

(iii) The applicant having been released from detention, and the issue of whether the full period of his detention was or was not lawful still being outstanding, no order will be made in respect of the application for orders of *certiorari* to quash the decisions of the Director not to release the applicant contained in his letters of 17 June and 6 and 17 August 2006. For the same reason, no order will be made as to whether the applicant is entitled to damages for unlawful detention.

(iv) The applicant having been released from detention, no order of *mandamus* requiring his release will be made.

125. “AS” :

(i) The application for a declaration that the detention of the applicant by the Director since 27 June 2005 was unlawful by virtue of not being a detention merely for the purposes of effecting his removal, such detention violating art.5 of the Hong Kong Bill of Rights, is dismissed.

(ii) The application for a declaration that the failure to rescind the deportation order of 23 May 2005 was contrary to the obligation to assess the applicants’ claim under the Convention Against Torture is dismissed.

(iii) The applications for orders of *mandamus* are dismissed.

(iv) The applicant having been released from detention, and the issue of whether the full period of his detention was or was not lawful still being outstanding, no order will be made in this respect. For the same reason, no order will be made as to whether the applicant is entitled to damages for unlawful detention.

126. 'F' :

(i) The application for a declaration that the detention of the applicant by the Director since 19 July 2005 was unlawful by virtue of not being a detention merely for the purposes of effecting his removal, such detention violating art.5 of the Hong Kong Bill of Rights, is dismissed.

(ii) The application for a declaration that the failure to rescind the removal order of 30 June 2005 was contrary to the obligation to assess the applicants' claim under the Convention Against Torture is dismissed.

(iii) The application for an order of *certiorari* quashing the removal order of 30 June 2005 is dismissed.

(iv) The application in the alternative for an order of prohibition to prevent the execution of the removal order of 30 June 2005 is dismissed.

(v) The applicant having been released from detention, and the issue of whether the full period of his detention was or was not lawful still being outstanding, no order will be made in this respect. For the same reason, no order will be made as

to whether the applicant is entitled to damages for unlawful detention.

127. 'YA' :

(i) The application for a writ of *habeas corpus* based on the assertion that, having made a claim under the Convention Against Torture, the continued detention of the applicant pursuant to s.32(3A) of the Immigration Ordinance was unlawful is dismissed.

(ii) Insofar as it may be relevant, the applicant having been released from detention, and the issue of whether the full period of his detention was or was not lawful still being outstanding, no order will be made in this respect. For the same reason, no order will be made as to whether the applicant is entitled to damages for unlawful detention.

128. As I understand it, the applicants are all legally aided. There will therefore be an order for taxation of their costs in accordance with Legal Aid Regulations. As to any further order for costs, I will, if necessary, hear from the parties.

129. There will be liberty to apply.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

Mr Philip Dykes, SC and Mr Hectar Pun,
instructed by Messrs Barnes & Daly, assigned by Director of Legal Aid,
for Applicants in HCAL 100/2006 and HCAL 28/2007

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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