DCCJ 1717/2010

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. 1717 OF 2010

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BETWEEN

SAEED MUHAMMAD otherwise known as MOHAMMED SAID — Plaintiff

and

SECRETARY FOR JUSTICE sued for and on behalf of DIRECTOR OF IMMIGRATION — Defendant

_____

Coram: His Hon Judge Leung in court

Date of hearing: 14; 16 June 2011

Date of judgment: 21 October 2011

J U D G M E N T

1. This is the claim by the Plaintiff ("**M**"), a Pakistani national, against the Director of Immigration ("**the Director**") for damages for wrongful detention in the immigration centre in Hong Kong in 2008. The Secretary for Justice is named as the defendant for and on behalf of the Director.

Background

2. On 22 November 2007, then 20-year-old M entered Hong Kong from the Mainland illegally. He was arrested for illegally remaining by the police on Christmas Eve. After a brief stay at the hospital for finger injury, M was discharged and detained by the police pursuant to section 26 of the Immigration Ordinance ("**IO**").

3. On 1 January 2008, M was transferred to the Immigration Department. On the following day, he began his detention at the Castle Peak Bay Immigration Centre ("**the Centre**") under section 32(2A)(a) of the IO (for a maximum of 7 days) pending the decision as to whether a removal order should be made.

4. On 7 January 2008, the Secretary for Security ("**the Secretary**") authorised the detention of M to continue under section 32(2A)(b) (for a maximum period of 21 days). M was informed of the continued detention.

5. On 17 January 2008, during the interview by the immigration officer, M lodged his claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment ("**CAT**"). M's claim was referred for assessment while the Director sought comments from the Commissioner of Police on the intended release of M in the interim.

6. No adverse comment was received; and M was recommended for release on recognisance subject to the provision of cash surety and reporting condition. Upon approval of the recommendation on 28 January 2008, M was released on recognisance on the following day.

7. In May 2010, M commenced the present action, alleging that his detention under section 32 of the IO was wrongful; and now claims damages for wrongful detention.

8. Until the day before the trial, M had been legally represented.

The dispute

9. The pleaded case of M is that his detention was wrongful because there was no published policy as to how the power of detention under section 32 of the IO was to be exercised, contrary to Art.5(1) of the Hong Kong Bill of Rights ("**HKBOR**") intorduced under section 8 of the Hong Kong Bill of Rights Ordinance, Cap.383 ("**HKBORO**").

10. The claim is obviously the aftermath of the Court of Appeal judgment in *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 ("**the case of *A***").

11. The pleading is unclear as to whether M was complaining about his detention from 17 January 2008 (when the CAT claim was communicated to the Director) to his release on recognisance on 29 January 2008 (per §§2-3 of the Statement of Claim) or the entire period of his administrative detention since 2 January (per §4 of the Statement of Claim). It was in court when M confirmed that his complaint is about the period of detention since he lodged the CAT claim. That lasted for 13 days until he was released.

12. By pleading, the Director admits that the prevailing detention policy was not put in place until 18 October 2008 which was well after M's detention and release. Nevertheless, it is contended that M would have

been detained in any event whether or not a published detention policy had been put in place at the material time. Therefore there was no causal link between the alleged breach of Art.5(1) of the HKBOR and M's loss of liberty.

13. In his submission, Mr Chow SC (appearing with Miss Grace Chow) set out the following contentions of the Director:

(1) The primary contention is that because of section 11 of the HKBORO, Art.5 of the HKBOR does not affect the application of section 32 of the IO to M.

(2) The secondary contention is that in any event, the judgment in the case of *A* has no application to the application of section 32 to the detention of M in the present case.

(3) Therefore the detention of M was not unlawful. In the premises, the Director says that M's claim should be dismissed.

(4) In the event that this court finds that the detention of M in the present case was unlawful, M is nevertheless entitled to no more than nominal damages.

14. The primary contention of the Director on the basis of section 11 of the HKBORO does not really transpire from the pleading. However, the contention is one of law and its making does not entail the introduction of further evidence. The fact was that M, now appearing in person, chose not to engage in submission at all during the trial.

Section 32 of the IO

15. The relevant provisions of section 32 of the IO read as follows:

"**Detention pending removal or deportation**

……

> (2A) A person may be detained pending the decision of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration as to whether or not a removal order should be made under section 19(1)(b) in respect of that person –
> (a) for not more than 7 days under the authority of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration;
> (b) for not more than a further 21 days under the authority of the Secretary for Security; and
> (c) where inquiries for the purpose of such decision have not been completed, for a further period of 21 days under the authority of the Secretary for Security, in addition to the periods provided under paragraphs (a) and (b).
>
> (3) A person in respect of whom removal order under section 19(1)(b) is in force may be detained under the authority of the Secretary for Security pending his removal from Hong Kong under section 25.
>
> (3A) A person in respect of whom a removal order under section 19(1)(b) 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."

A (Torture Claimant) v Director of Immigration

16. The starting point is the Court of Appeal judgment in the case of *A.* That case concerned various subjects of removal and deportation orders under sections 19 or 20 of the IO. They applied for judicial review challenging the legality of their continued detention by the Director under section 32 of the IO since the lodging of their respective claims under the CAT. Their applications were dismissed; and they appealed.

17. The Court of Appeal, among other things, had the following conclusion:

> (1) Under domestic law, the power to detain pending removal under section 32 is in principle exercisable so long as the Secretary is intent upon removing the subject at the earliest possible moment, and it is not apparent that removal within a reasonable time would be impossible. This reflects the application of the principles in *R v*

Governor of Durham Prison, ex p Hardial Singh [1984] 1 WLR 704 (approved and applied in *Tan Le Lam & Ors v Superintendent Tai A Chau Detention Centre* [1997] AC 97; *Thang Thieu Quyen & Ors v Director of Immigration & Anor* (1997-98) 1 HKCFAR 167; R *(Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207).

(2) However Art.5(1) of the Hong Kong Bill of Rights ("**HKBOR**") requires that detention must not be arbitrary and the grounds and procedures must be certain and accessible. In the absence of a published policy as to the circumstances under which the power to detain would be exercised, the power of detention under section 32 were contrary to Art.5(1) of the HKBOR and therefore unlawful.

18. The Court of Appeal granted the declarations that the detention of each of the applicants in the case of *A* was unlawful for breach of Art.5(1) of the HKBOR: see further judgment dated 18 July 2008. The case reverted to the Court of First Instance where each of the applicants was awarded damages: see *A (Torture Claimant) v Director of Immigration* [2009] 3 HKLRD 44 ("**the case of *A* (damages)**").

Section 11 of the HKBORO

19. By virtue of Art. 39 of the Basic Law:

> "The provisions of the International Covenant on Civil and Political Rights ["**ICCPR**"], the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

20. Art.9 of the ICCPR guarantees the personal liberty of person. Similar guarantee is essentially reproduced in Art.5 of the HKBOR:

> "(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.
>
> ……
>
> (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

21. The primary contention of the Director is that G cannot found his claim on the rights guaranteed under Art.9 of the ICCPR and Art.5 of the HKBOR. The reason is section 11 of the HKBORO, which provides:

> "as regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

22. In the case of *MA & Ors v The Director of Immigration*, HCAL 10/2010 (6 January 2011), Andrew Cheung J (as he then was) held (at §§37-38) that according to its natural and ordinary meaning, the phrase "entry into, stay in and departure from Hong Kong" in section 11 of the HKBORO covers the entire period from arrival until departure that a foreigner is in Hong Kong irrespective of whether the stay was lawful or not, i.e., as a lawful visitor, an illegal immigrant or an overstayer.

23. M entered Hong Kong illegally and had no right to remain in Hong Kong at the material time. The exercise of the power under section 32 to detain M must be an application of the IO and a facet of his entry and stay in Hong Kong. Section 11 of the HKBORO apparently applies to M.

24. On 13 October 2011, I handed down my judgment in *Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration*, DCCJ 531/2010 ("**the case of *G***"). There Mr Chow SC (with Miss Grace

Chow) also appeared for the Director and made the same submissions on law as those made in the present case. The difference is that unlike the present case, the issue of whether the application of section 32 of the IO is or ought to be excepted by section 11 of the HKBORO was actually argued in the case of *G*.

25. In the recent case of *Ubamaka v Secretary for Security* [2011] 1 HKLRD 359, the Court of Appeal discussed the question of whether section 11 of the HKBORO was valid and effective in excepting the application of the IO that, it was argued, would result in the infringement of the rights guaranteed under the ICCPR (and the HKBOR) that were peremptory and non-derogatory norms of customary international law.

26. Fok J (as he then was) ruled (at §§133-137) that the Hong Kong courts are only concerned with the domestic law level where the immigration reservation to the ICCPR imposed by the UK Government as applied to Hong Kong is valid. This position is now reflected by section 11 of the HKBORO. Fok J also rejected the argument that section 11 should be given a narrow construction (see §§139-148) and the argument that the immigration reservation to the ICCPR and section 11 of the HKBORO do not manage to preclude the rule of customary international law from being incorporating into the common law of Hong Kong (see §§149-151). Stock VP (at §§2; 8-10) and Andrew Cheung J (as he then was) (at §11) agreed.

27. I repeat what I said in the case of *G*:

> "45. Andrew Cheung J sat as a member of the Court of Appeal in both the cases of *A* and *Ubamaka*. His Lordship then sat in the subsequent case of *MA* (above). The applicants in the case of *MA* were mandated refugees and screened-in CAT claimants. They claimed the right to work during their stay in Hong Kong. The immigration reservation to the ICCPR as reflected by section 11 of the IO was relied on by the Director. Faced with the argument that the section was incompatible with Art 39 of the Basic Law, his Lordship

considered that the matter was squarely covered by the Court of Appeal decision in *Ubamaka* as discussed above; and rejected such argument.

46. As far as the application of section 11 of the HKBORO is concerned, Mr Chow SC submitted that the position of G, being a CAT claimant, was in no better position than the screened-in CAT claimant and mandated refugee in *Ubamaka*. I agree.

47. It is true that notwithstanding their conclusion about the application and effect of the immigration reservation to the ICCPR and section 11 of the HKBORO, the Court of Appeal in *Ubamaka* did not disturb the declaration granted by the judge that the detention of the applicant in that case under section 32 was unlawful. However, this was because counsel for the Director accepted during the appeal that the judge was bound by the case of *A* to draw that conclusion on the basis that there were at the material time no certain and accessible grounds or procedures for such detention (see §§170-172).

48. In the case of *MA*, Andrew Cheung J also observed (at §41) that in the case of *A*, the Director did not rely on section 11 of the HKBORO to argue that section 32 of the Immigration Ordinance was actually excepted from the operation of the HKBOR. In *Ubamaka*, it was not argued that the decision in the case of *A* stood in the way of the Court of Appeal's eventual conclusion that section 11 was actually effective to except the Immigration Ordinance from the operation of the HKBOR in relation to matters concerning entry into, stay in and departure from Hong Kong. His Lordship considered that what was stated in *Ubamaka* should be the current state of the relevant law. Therefore the reliance by the applicants there on the rights guaranteed under the HKBOR or the ICCPR had to be rejected.

49. Now Mr Chow SC confirmed that the effect of his submission on the immigration reservation to the ICCPR, now reflected by section 11 of the HKBORO, is that had the attention of the Court of Appeal in the case of *A* been drawn to the application and effect of that section, the decision in that case should have been different.

50. No doubt the case of *A* is binding on this court. However as observed by Andrew Cheung J in the case of *MA*, the subsequent decision of the Court of Appeal in *Ubamaka* represents the current state of the law regarding the validity and effect of section 11 of the HKBORO. In that respect, this court has all the good reasons to follow *Ubamaka* too.

51. Following *Ubamaka*, as Andrew Cheung J did in the case of *MA*, I should conclude that section 11 of the HKBORO has excepted section 32 of the IO and its application from the application of the HKBOR. I should also conclude that G is not in a position to found his claim on the rights guaranteed under either Art.9 of the ICCPR or Art.5 of the HKBOR. This is my conclusion."

28. I draw the same conclusion in the present case.

Detention pursuant to section 32(2A) as opposed to 32(3) and (3A)

29. If I am wrong above or should have simply found myself bound by the case of *A*, the Director's secondary contention would be that the judgment in the case of *A* nevertheless does not affect the legality of the detention of M in the present case.

Section 32(2A)

30. Mr Chow SC submitted that what the Court in the case of *A* was asked to decide, and has decided, was specifically detention pending removal (under section 19(1)) or deportation (under section 20) pursuant to sections 32(3) and (3A) of the IO. The judgment in the case of *A* therefore has no application in respect of detention pursuant to section 32(2A) in the present case.

31. Again the same secondary contention was argued in the case of *G*. There I considered whether according to the principles applied in the case of *A*, the legality of the power to detain under section 32(2A) suffers the same fate as sections 32(3) and (3A). I found:

> "72. The starting point is that sections 32(3) and (3A) permit a person to be detained pending, i.e., until, removal under section 25. There is no limitation on the purpose for which a person subject to a removal order could be detained (not even limited to "for the purpose of removal"), or the duration of such detention: see the case of *A* at §§29-30; *Thang Thieu Quyen* (above) at 188; *Khadir* (above) at §32.
>
> 73. In the case of *A*, Tang VP said (at §63):
> "Article 5 requires that the detention be not arbitrary and in accordance with certain and accessible grounds and procedure. In other words, it is for the Director to justify detention and not for the applicant to seek release from detention. The existence of clear and lawful policy ensures that the Director, when making his decision whether or not to detain, would have had all the relevant

> circumstances under consideration, and that the decision to detain would not be arbitrary. The availability of such grounds would also enable an applicant to know how best to ensure that he is not detained……"

74. The grounds and procedure for the exercise of the power to detain could be made certain by a policy and accessible by publication. But making a policy is not the only way. The same could also be achieved by way of legislation (see the case of *A* at §41). Mr Chow SC submitted that that is the case insofar as the power to detain under section 32(2A) is concerned.

75. The circumstances in which the powers to detain under sections 32(2) or (2A) may be exercised are set out in subsection (1A):

> "Where the consideration is being given to applying for or making a removal order in respect of a person, that person may be detained as provided for in subsection (2) or (2A), whichever is appropriate in the particular case."

76. As mentioned, sections 32(2A) limits the power to detain to be exercised for the sole purpose of inquiries for deciding whether to make the removal order. The duration of detention was also limited. These two elements of the power to detain under section 32(2A) are apparently certain and accessible by way of the legislation itself.

77. However, whilst the power to detain under section 32(2A), properly construed, is limited by reference to the purpose of inquiries as to whether a removal order should be made, the conduct of such inquiries does not presume the need for detention. Considering the legislation alone, I would not say that the grounds and procedure for detention under section 32(2A) are certain and accessible as required by Art.5(1) of the HKBOR.

78. Referring to section 32(2A), one cannot further form any idea as to what could lead to the detention of a subject of inquiries for the purpose of deciding whether a removal order should be made. In that sense, if I may say so with respect, Saunders J in *Hashimi* seemed to share a similar view when his Lordship commented on the sufficiency of the Notice of Detention Authority as a statement of the detention policy (see §§35-36).

79. I do understand Mr Chow SC's argument that it may be unrealistic in the circumstances of a particular case, or even frequently the case, to expect the subject of such inquiry to be left at large. But this is never a complete, if legitimate, answer.

……

83. …… for the reasons explained earlier, I would already conclude that the power to detain under section 32(2A) is unlawful for infringement of Art.5 of the HKBOR.

84. In the circumstances, I do not agree with Mr Chow SC that the ground and procedure of detention under section 32(2A) is made certain by the wordings of the section itself. If I were wrong about that, I would have agreed

> that the ground and procedure would be accessible; and to a person like G too if the protocol to arrange translation is adhered to.
>
> 85. In conclusion, had the application of the IO that governs the entry into, stay in and departure from Hong Kong as regards G not been excepted from the HKBORO by virtue of section 11, I would have concluded that the power to detain under section 32(2A) is unlawful for breach of Art.5(1) of the HKBOR."

32. For the same reason, I draw the same conclusion in respect of the lawfulness of the power to detain under section 32(2A) in the present case.

Hardial Singh principles

33. By pleading, it is contended that the Director had all along been considering whether a removal order should be made in respect of M at the material time; and had believed that such decision could be made within reasonable time at each stage of the process. The Director had made all reasonable effort within its power in considering whether to make the removal order and to release M on recognisance. It seems such contentions are made with reference to the principles in *Hardial Singh* (above) (at 706C-G), which I also summarised in the case of *G* (above) (at §§86-87).

34. In the case of *G*, Mr Chow SC submitted that the *Hardial Singh* principles were premised on a power to detain pending the making of a deportation order (albeit the decision to deport has been made) or removal subject to no limitation on duration. Hence the principles apply to section 32(3) and (3A) of the IO. Since section 32(2A) is expressly subject to limitation on the duration of detention, the *Hardial Singh* principles are not applicable. This is also the stance of Mr Chow SC in the present case, notwithstanding the pleading mentioned above.

35. In any event, the *Hardial Singh* principles govern the exercise of the power to detain. In approving the principles, Lord Brown in *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207 (at §33) said:

> "To my mind the R v Governor of Durham Prison, ex p Hardial Singh line of cases says everything about the exercise of the power to detain (when properly it can be exercised and when it cannot); nothing about its existence."

36. This explains why the Court of Appeal in the case of *A* when considering the legality of the detention of the applicants there under the domestic law, the conclusion was that the power under section 32 was exercisable in principle so long as the test under the *Hardial Singh* principles was met as a matter of fact.

37. As I found in the case of *G* (§90), it will only be that, if the detention is lawful in terms of the decision in the case of *A*, the issue of whether or not the detention is in breach of the *Hardial Singh* principles arise. In view of my conclusion as to the legality of the power to detain under section 32(2A) under Art.5(1) of the HKBOR, the question of whether the *Hardial Singh* principles apply and whether they were complied with does not call for a conclusion. See also *Raju Gurung v The Secretary for Security and Anor*, unrep., HCAL 5/2009 (21 August 2009) (at §§ 50; 53).

<u>On liability</u>

38. In conclusion, M fails on liability.

<u>On Damages</u>

39. For completeness, I proceed to consider the damages that M would have been entitled to, had he established liability.

Causation

40. As mentioned, the Director contends that any loss and damage for loss of liberty suffered by M was not caused by the unlawful detention for breach of Art.5(1) of the HKBOR. In his submission, Mr Chow SC made clear that this is a question of causation in respect of quantum, not liability.

41. The tort of false imprisonment is actionable *per se* without proof of damage. However, if the person detained would have been lawfully detained, whether due to the following of the proper procedures that should have been followed or an alternative basis whereby he could have been lawfully detained, the person detained would be entitled to no more than nominal damages.

42. The above principle has been approved in the recent judgments of the UK Supreme Court: in *R(WL (Congo)) v Home Secretary* [2011] 2 WLR 671 at §§90-91, 93, 95 and 169 per Lord Dyson; §§222 and 237 per Lord Collins; §§252, 253 and 256 per Lord Kerr; also (though dissenting on the issue of liability) at §335 per Lord Phillips and §§342 and 361 per Lord Brown; and in *Shepherd Masimba Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23 at §§74 and 77 per Lady Hale; and §§88 and 89 per Lord Kerr.

43. Mr Chow SC submitted that M has the burden to prove the causal link between the breach of Art.5(1) of the HKBOR and his loss of liberty. If it is not established that he would not have been detained or would have been released earlier, he will be entitled to no more than nominal damages. He relied on *R (on the application of KB and others) v Mental Health Review Tribunal and another* [2003] 2 All 209.

44. As I pointed out in the case of *G* (at §§100-101), the complaint of the mental patients in the case of *R(KB)* was the delay in the hearings of their applications for review of their detention. The delay, they complained, amounted to infringement of their rights to speedy hearings. On that basis, they claimed damages for what, they said, would have happened, had their rights to speedy hearings been respected. They actually contended that they could have obtained favourable decisions after the hearing of their applications for review earlier. It was on this basis that the English court in *R(KB)* said (at §64) that a claimant who seeks damages on the basis of an allegation that he would have had a favourable decision at an earlier date if his convention right had been respected must prove his allegation on the balance of probabilities.

45. In the present case, M is complaining about the legality of his detention. In the case of *G*, I agreed (at §§102) that in principle, the person that had been detained has to prove the causal link between the breach and his loss (arising out of the loss of liberty) for the purpose of establishing his entitlement to substantial damages. But in practice, this should not be difficult. The question of whether he would have been lawfully detained in any event arises only if there is suggestion and evidence of the policy or criterion under section 32 or some other alternative lawful procedure *existing at the material time* upon which he would have been detained lawfully. In the absence of such suggestion or evidence, it would be hard to expect the person that had been detained to positively contend that he would not have been detained on any other basis. Nor may the court be expected to conclude whether the person that had been detained would have been lawfully detained in any event.

46. In *WL(Congo)* (above) and *Kambadzi* (above), the claimants were detained unlawfully because the authority had applied an unpublished policy that was inconsistent with the published policy. The parties and the court in these English cases were able to consider and conclude whether the claimants would have been detained or not, had the published policy existing at the material time been followed. In the present case, it is admitted that the detention policy for section 32 did not come into existence until October 2008.

47. Another example is the case of *A*. In the case of *A* (damages), Andrew Cheung J referred to the local case of *Pham Van Ngo v AG*, unrep., HCA 4895/1990 (1993) and found (at §47) that the detention of the Vietnamese refugees in that case was unlawful for a technical reason. The reason was that there were in fact alternative statutory provisions at that time by which the refugees could have been lawfully detained. His Lordship continued (at §53(4)) by finding that unlike the position in *Pham Van Ngo*, there was no alternative lawful procedure other than section 32 available to the Director or the Secretary to detain the applicants in the case of *A*, in the absence of a certain and accessible policy on the exercise of the powers to detain. Again it was noted that such detention policy did not come into existence until October 2008.

48. The breach in the case of *A* was not a technical breach. In other words, the applicants indeed should not have lost their liberty but for the unlawful detention under section 32 of the IO. Causation was thus proved. Indeed his Lordship awarded substantial general damages to all the applicants in the case of *A*.

49. In the present case, it is actually the Director who pleads that M would have been detained in any event whether or not a detention policy

had been put in place during the period complained about. It may be said that the Director who alleges bears the burden of proof. In this respect, the Director referred to the following circumstances:

(1) After his detention, the Director had conducted record checks and interviews to ascertain M's identity.

(2) On 16 January 2008, M's passport was provided to the Director by a local connection of his.

(3) On 17 January 2008, M lodged the CAT claim.

(4) On 22 January 2008, M's case was referred to the Removal Section and consideration whether he should be released on recognisance began.

(5) On 25 January 2008, M's detention was reviewed. Considering all the relevant circumstances such as the prospect of effecting M's removal within a reasonable time, risk to law and order if he was released and risk of his absconding or re-offending if released, the Director decided to release M on recognisance.

(6) On 29 January 2008, M was released.

50. There is no dispute that M entered Hong Kong via the Mainland other than by legal means. Until his passport was obtained through a third party on 16 January 2008, M's identity remained unverified at all. In these circumstances, the detention of M during this period may surprise no one, even if the precise basis and procedure whereby he could be so detained is not identified. As mentioned, M confirmed in court that he is not complaining about this period of detention.

51. Upon the Director's receipt of his passport, M also lodged the CAT claim. The claim was that he had a political dispute with his opponent party; and his life was threatened. His family advised him to leave the

country for his safety. Whether the claim is genuine is not a matter for this court. Yet in principle, in view of such claim, the fact that M entered Hong Kong other than by legal means *per se* does not necessarily operate adversely against him. The internal document shows that consideration was indeed given to waiver of prosecution of M for illegal remaining in view of the CAT claim.

52. As I held in the case of *G* (above), section 32(2A) limits the power to detain to the purpose of inquiries for deciding whether a removal order should be made. But the conduct of such inquiries for making such decision does not presume the need for detention. As a policy or the criterion for the exercise of the power under section 32(2A) did not exist at the material time, the Director would have to suggest and to adduce evidence of the alternative legal basis and procedure whereby M would have been lawfully detained in any event as pleaded notwithstanding the CAT claim. Such suggestion and evidence is lacking.

53. In the circumstances of this case, the conclusion that M lost his liberty as a result of his detention under section 32(2A), which was unlawful, remains. This was not a technical breach. Therefore I would have found that irrespective of the burden of proof in this respect, the causal link between the breach of Art.5(1) of the HKBOR and his loss of liberty exists so as to entitle M to more than nominal damages.

Ordinary damages

54. Ordinary damages are compensatory. They consist of: (i) general damages comprising a first element of compensation for loss of liberty, and a second element of damage to reputation, injury to feelings and the like, which element was to a substantial extent subjective; and (ii) special

damages for pecuniary loss incurred: see the case of *A* (damages) at §§53(3)-(7).

55. As Andrew Cheung J said in the case of *A* (damages) (at§53(15)):

> "…… local awards should be looked at. However, it cannot be overemphasised that no two cases are the same. Moreover, even in comparable cases, one would still have to be satisfied that the previous award was appropriate and right. It is wrong to use past cases – even local ones – as if they contained figures set by statutes. Nor do they act as any straitjacket. Their real use, particularly when considered collectively, is to provide the court with a general "feel" of the appropriate amount of the award in the case at hand and to act as a cross-check against any significant departure, one way or the other, from the previous awards, or, where it can be observed, the prevailing trend of awards……"

56. I agree with Mr Chow SC that the awards made by his Lordship in the case of *A* (damages) are the most significant for and relevant to our present purpose.

57. Relative to the applicants in the case of *A*, M's circumstances are nowhere near the least serious circumstances of applicant "A", who had been wrongfully detained for 3 months. Circumstances peculiar to applicant "A" in that case included the effect of the unlawful detention in impeding the intended marriage, the staging of hunger strike and the depressive condition during detention. These peculiar circumstances were absent in the present case.

58. As to the condition of detention, M made various complaints in his statement. However, he admitted in court that he was not searched naked in front of 20 persons as alleged in his statement. His body search on admission to the Centre was conducted in accordance with rule 9 of the Prison Rules, Cap.234A. He managed to make free local telephone calls; and his friend had also made such calls on his behalf. He was allowed to make use of an area in the dayroom designated for saying prayer. M

speaks Punjabi, Urdu and a little bit of English. He had no complaint about language problem, clothing, bedding or food either. Besides loss of liberty, the complaint about adjustment disorder during detention is the only particular of loss and damage actually pleaded. Yet the complaint lacks medical evidence in support.

59. In court, M submitted a sheet of paper containing citation of 4 cases where the parties concerned are said to have received compensation in the sum of HK$13,000 to HK$30,000. I suspect that he managed to obtain them from his former solicitors. According to Mr Chow SC, those were cases that had been settled out of court. For the present purpose, they have no value. I agree.

60. Applicant "A" in the case of *A* was awarded HK$80,000 ordinary damages. Considering the circumstances of G, including those discussed above, I agree with Mr Chow SC that the award in the present case should be lower. He suggested HK$10,000 and I agree that this amount would have been more than reasonable in the circumstances.

Others

61. There is no claim for declaration in respect of the legality of the period of detention complained about. Nor is there claim for aggravated or exemplary damages as in the case of *G*. In any event, award of such damages would not have been warranted in the circumstances of this case.

Conclusion

62. In summary, I have the following conclusion:

(1) Because of section 11 of the HKBORO, the ordinance does not affect the application of the IO to M's stay in Hong Kong including the exercise of the power of detention under section 32 of the IO. In the premises, M cannot found his claim for unlawful detention on the basis of Art.5(1) of the HKBOR.

(2) In the premises, M's claim must fail and should be dismissed. But for that, M would have been entitled to claim for unlawful detention under section 32(2A) of the IO for the lack of certain and accessible grounds and procedure required by Art.5(1) of the HKBOR.

(3) M would have been entitled to substantial damages, which would be ordinary damages in the sum of HK$10,000.

Order

63. Failing on liability, M's claim is dismissed. I make a nisi order that M shall pay the Director's costs of this action, including any costs reserved, to be taxed if not agreed. For the avoidance of doubt, I certify the engagement of two counsel. In the absence of application to vary within 14 days, the nisi costs order shall become absolute.

Simon Leung
District Judge

The Plaintiff, in person, present

Mr Anderson CHOW and Miss Grace CHOW instructed by the Department of Justice for the Defendant

[*] The application for leave in *Ubamaka* was dismissed on 25 May 2011 (see the written reasons handed down on 31 May 2011).