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DCCJ 531/2010

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. 531 OF 2010

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BETWEEN

GHULAM RBANI	Plaintiff
and	
SECRETARY FOR JUSTICE for and on behalf of THE DIRECTOR OF IMMIGRATION	Defendant

———————

Coram: His Hon Judge Leung in court

Date of hearing: 9; 17 June 2011

Date of judgment: 13 October 2011

J U D G M E N T

1. This is the claim by the Plaintiff ("**G**"), a Pakistan national, against the Director of Immigration ("**the Director**") for damages for false imprisonment and breach of his constitutional rights due to his detention in the immigration centre in Hong Kong in 2005. The Secretary for Justice is named as the defendant for and on behalf of the Director.

Background

2. G first came to Hong Kong in 1992 using a passport bearing the name of Ghulam Rubbani, born on 15 April 1971. He was allowed to stay for 3 months but he overstayed. For that, he was subsequently charged with and convicted of breach of condition of stay, fined and repatriated to the Pakistan in August 1993. He had overstayed for about 10 months.

3. G came to Hong Kong again in 1994 using another passport bearing the name of Mian Ghulam Rabani, born on 15 April 1970. He was permitted to stay for 3 months. Again he overstayed; and was convicted and fined. He was repatriated to the Pakistan in July 1995. He had overstayed for about 5 months.

4. In May 1999, G revisited Hong Kong using another passport bearing the name of Ghulam Rabbani, born in 1967. For once again overstaying and making false representation to the immigration (as regards his date of birth during his last visit), G was convicted and given a suspended imprisonment sentence before removal to Pakistan in October 1999. On this occasion, he had overstayed for about 4 months.

5. G last came to Hong Kong on 24 September 2000 when he used yet another passport, this time bearing the name of Ghulam Rbani, born in 1971. He was permitted to remain as a visitor until 15 October 2000; but he had since overstayed here. On 1 April 2005, G was arrested by the police for gambling in a place not being a gambling establishment. He was so charged with the offence together with that of breach of condition of stay. Together with the activated suspended sentence (mentioned above), G was sentenced to a total of 7 months' imprisonment.

6. After serving slightly less than 5 months in prison, G was discharged from the prison on 23 August 2005. Since then, G had been placed under administrative detention by the Director in the Castle Peak Bay Immigration Centre ("**the Centre**") pursuant to section 32 of the Immigration Ordinance, Cap.115 ("**the IO**").

7. During the interviews prior to his release from prison in August 2005, not only did G raise no objection to his deportation, but he also positively requested to return to Lahore, Pakistan as soon as possible. The reasons given were his concern about his family, his aged mother and sick son. G repeated his request and reasons by his letter to the Department and during the interview on the day of his release from prison.

8. In view of G's request, the Director wrote to the Consulate General of the Republic of Pakistan 2 days after G's administrative detention to seek confirmation for the issue of an emergency passport to G. In the meantime, G's detention pursuant to section 32(2A)(a) expired; and was continued by the Secretary for Security ("**the Secretary**") under section 32(2A)(b) for 21 days from 29 August 2005. G acknowledged receipt of the notification of the further detention by signing it on 31 August 2005.

9. The Director received a positive reply from the Pakistani counterpart on 2 September 2005. An emergency passport of G was issued and air ticket was procured. Application for a removal order was made on 7 September 2005; and the order was issued on 10 September 2005.

10. Unbeknown to the Director, G lodged a claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**CAT**") on 5 September 2005. According to

him in court, he changed his mind about repatriation upon learning that his son had recovered.

11. As G confirmed, his written statement containing the CAT claim was sent by post. This was received by the Department on 8 September; and by Removal Sub-division of the Department on 12 September 2005. The issue of the removal order apparently crossed with G's letter.

12. Service of the removal order, though made, was then withheld and eventually withdrawn on 15 September 2005.

13. On 16 September 2005, the Secretary authorised the detention of G for a further period of 21 days pursuant to section 32(2A)(c). G was given the notification of the continued detention on 21 September 2005. But G refused to sign it.

14. Screening interview of G in respect of his CAT claim began. On 7 October 2005, G was released on recognisance. It was a month and a half since his release from prison; and about a month since he lodged the CAT claim.

A (Torture Claimant) v Director of Immigration

15. In *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 ("**the case of *A***"), the applicants were the 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.

16. 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."

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 hence unlawful.

18. The Court of Appeal granted the declarations that the detention of each of the applicants in the case of *A* was illegal 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)**").

The dispute

19. As pleaded, based on the judgment in the case of *A*, G now claims that his detention after release from prison until his release on recognizance was unlawful as there was at the time no certain and accessible policy on how the discretion to detain under section 32 of the IO would be exercised. For alleged false imprisonment, G claims basic damages, aggravated damages and exemplary damages.

20. G also claims that the detention was in violation of his constitutional rights guaranteed under Art.9(1) of the International Covenant on Civil and Political Rights ("**ICCPR**"), Arts.28 and 39 of the Basic Law, and/or Art.5(1) of the Hong Kong Bill of Rights Ordinance, Cap.383 ("**HKBORO**"). He claims constitutional damages pursuant to Art.35 of the Basic Law and section 6(1) of the HKBORO.

21. The Director's primary contention is that because of section 11 of the HKBORO, Art.9 of the ICCPR or Art.5 of the HKBOR does not affect the application of section 32 of the IO to G. 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 G in the present case. Therefore the detention of G was not unlawful.

22. In the premises, the Director says that G's claim should be dismissed. However, in the event that this court finds that the detention of G in the present case was unlawful, the Director contends that G is nevertheless entitled to not more than nominal damages; or alternatively, substantial damages but not in the sum as claimed.

Section 11 of the HKBORO

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

> "The provisions of the International Covenant on Civil and Political Rights, 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."

24. Art.9 of the ICCPR guarantees the personal liberty of person, which 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."

25. 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."

26. In the case of *MA & Ors v The Director of Immigration*, HCAL 10/2010 (6 January 2011) (which will be further discussed below), 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.

27. At the time when G was detained, he had no right to remain in Hong Kong. Further the exercise of the power under section 32 to detain G must be an application of the IO and a facet of his stay in Hong Kong. Section 11 of the HKBORO applies to G fairly and squarely. Literally construed, the section does except the application of the IO to G from the HKBORO (and hence the HKBOR).

28. However Mr Dykes SC (appearing with Mr Hectar Pun) submitted that the right to be free from arbitrary detention and the right to habeas corpus are peremptory norms of customary international law (*jus cogens*). Section 11 of the HKBORO cannot be applied to trump the non-derogatory nature of these peremptory norms in international law.

29. Mr Chow SC (appearing with Miss Grace Chow) took issue as to his opponent's reliance on customary international law, which was neither pleaded nor formally raised during opening submission. This observation is fair. More importantly, customary international law must be proved. In this regard, Mr Chow SC referred to *C & Ors v Director of Immigration* [2008] 2 HKC 165 (*) (at §§ 65-68) to illustrate the fundamental elements constituting a rule of customary international law, namely:

(1) the rule should be of a norm-creating character, capable therefore of forming the basis of a general rule of law;

(2) there must be a settled and consistent practice by states; not by all states, but by states generally; and

(3) the practice must be followed because it is accepted as being legally obligatory.

30. Not only must the concept or right contended be proved to have developed into the customary international law, but the same must also have formed part of the Hong Kong law. Further it must be of the nature as peremptory norm so that no state can derogate from. In other words, for G's purpose, the rights contended must, and not just ought to, have attained the status of a peremptory norm from which no state can derogate.

31. Mr Dykes SC referred to General Comment No. 24 of the Human Rights Committee on issues relating to reservations made upon ratification or accession to the ICCPR. It includes the following statement:

> "8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of the rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to

> torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant woman or children, to permit the advocacy or national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of art. 14 may be acceptable, a general reservation to the right to be fair trial would not be."

32. Mr Dykes SC also produced extracts from various academic writings in support.

33. Unlike Mr Chow SC, my concern is not so much whether comments from the Human Rights Committee or academic writings are acceptable evidence. I tend to believe the court is receptive of them as evidence of international law and state practice. What I am not sure about is whether I am indeed presented with all the relevant materials (as evidence) for drawing a conclusion. At least I cannot ignore the likely compromise of Mr Chow SC's chance to provide the necessary assistance to the court in this respect because the argument on customary international law was raised at such a late stage.

34. Having said that, I do not think this actually prevents me from disposing of this argument on behalf of G. I say this because similar argument against the application of the immigration reservation has been attempted and ruled on in the recent case of *Ubamaka v Secretary for Security* [2011] 1 HKLRD 359.

35. In *Ubamaka*, the Nigerian national was imprisoned for drug offence in Hong Kong in 1993. Deportation order was later made against him. Due to his making of a CAT claim, he was transferred to the Centre upon

his release from the prison in 2007. In judicial review proceedings, the deportation order was quashed. The Secretary for Security appealed.

36. The Court of Appeal (at §48 of the judgment) set out the issues on appeal. As far as the complaint that the act of deporting the subject in the circumstances of the case would amount to cruel, inhuman or degrading treatment contrary to Art.7 of the ICCPR or Art.3 of the HKBOR as well as Art.14(7) of the ICCPR and Art.11(6) of the HKBOR is concerned, the Court of Appeal ruled against the applicant.

37. The Court proceeded to address the question that is relevant for our present purpose, namely whether the above complaint of the applicant in *Ubamaka*, even if substantiated, would be precluded by the immigration reservation to the ICCPR, which is now reflected by section 11 of the HKBORO. Central to this question would have been whether the concepts and rights guaranteed under those articles in the ICCPR were peremptory norms of customary international law from which no state may derogate by way of domestic legislative reservation or exemption (see §§131-132).

38. Fok J (as he then was), with whom Stock VP and Andrew Cheung J (as he then was) agreed, had this to say:

> "133. It is not necessary for the purpose deciding this case to determine the issue of whether the prohibition of torture or cruel, inhuman or degrading treatment or punishment is a peremptory norm of customary international law. It is only necessary to consider whether, even assuming the prohibition is a peremptory norm of customary international law, at a domestic law level (which is the only level with which the courts of Hong Kong are concerned) the immigration reservation to the ICCPR as applied to Hong Kong is valid. In my judgment …… there is no question but that, as a matter of domestic law, the courts of Hong Kong must give effect to the immigration reservation to the ICCPR as reflected in art.39 of the Basic Law and s.11 of the Hong Kong Bill of Rights Ordinance. I say this for the following reasons.
>
> 134. Article 39 of the Basic Law entrenches the provisions of the ICCPR but only "as applied to Hong Kong"…… The clear effect of that constitutional entrenchment of the ICCPR is that one must look to the terms of the United

Kingdom's ratification of the ICCPR to ascertain the extent to which the ICCPR has been applied to Hong Kong. That was the position before 1 July 1997 and it remains the position since that date by reason of art.39 of the Basic Law which is to the same effect. Furthermore, the effect of art.39 of the Basic Law is that, regardless of the enactment of the Hong Kong Bill of Rights Ordinance, the ICCPR as applied to Hong Kong in 1976 (upon ratification), 1984 (when the Joint Declaration was signed) or 1990 (when the Basic Law was promulgated), all of which dates predate the enactment of the Hong Kong Bill of Rights Ordinance, continues to have domestic force as from 1 July 1997.

135. So far as the courts of Hong Kong are concerned, therefore, the provisions of s.11 of the Hong Kong Bill of Rights Ordinance are binding, unless found to be inconsistent with any provision of the Basic Law. Far from being inconsistent with any such provision, in my view, s.11 of the Hong Kong Bill of Rights Ordinance reflects the evident fact that the United Kingdom Government viewed its reservation to the ICCPR in the relevant context of immigration control. It is also relevant to note that the immigration reservation entered into by the United Kingdom Government (and continued by the PRC in respect of Hong Kong) has not been the subject of any State objection under the Vienna Convention on the Law of Treaties. Moreover, there is a long line of cases decided in Hong Kong in which it has been confirmed that the effect of s.11 of the Hong Kong Bill of Rights Ordinance and the immigration reservation to the ICCPR is that the provisions of the Hong Kong Bill of Rights and ICCPR respectively could not be invoked to enable those not having the right to enter and remain in Hong Kong to resist removal or deportation ……

136. Thus, whilst it may be accepted that, as a matter of international law, derogation from a peremptory norm is not permissible, there is arguably a distinction between, on the one hand, such a derogation (which is impermissible) and, on the other hand, the act of choosing not to enter into a treaty which incorporates the peremptory norm itself (which must be permissible) or of choosing to enter into the treaty with a reservation regarding the relevant provisions incorporating the peremptory norm (which, as a matter of principle and logic, ought to be permissible). In any event, it is not necessary here to address and resolve the question of whether that distinction in international law is valid, since no such argument can arise at the domestic level, with which this judgment is concerned, since the courts of Hong Kong are required to apply art.39 of the Basic Law and s.11 of the Hong Kong Bill of Rights Ordinance.

137. I would add that if reliance is to be placed on a rule of customary international law, it is clear that this needs to be proved by showing that the rule in question is a rule of universal international practice. In the present case there is no evidence that States have applied a universal practice or prohibiting deportation where there is a risk of inhuman or degrading treatment……*A fortiori*, there is no evidence that the prohibition against inhuman and degrading treatment, and still less, the injunction against *refoulment* to inhuman and degrading treatment, have become *jus cogens.*"

39. Fok J also rejected the argument that section 11 of the HKBORO 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).

40. Mr Dykes SC submitted that what the Court of Appeal in *Ubamaka* said in respect of section 11 of the HKBORO was obiter. Indeed Fok J acknowledged that. Nevertheless his Lordship proceeded to address the question of the applicability and effect of the immigration reservation under section 11 of the HKBORO "as a matter of general importance" (see §124).

41. Besides agreeing with Fok J, Stock VP added that:

> "2. His (i.e., Fok J) judgment includes an analysis of the phrase "as applied to Hong Kong" as used in art.39 of the Basic Law, an analysis which is perhaps overdue since the phrase has periodically been the subject of some misunderstanding by advocates and in this case, there has been an attempt further to limit its meaning. I wish to add a word about the issue because it is one that now deserves some emphasis.
> ……
> 8. Whatever view might be taken by the Human Rights Committee or by commentators on the validity or desirability of a reservation thus applied, the phrase "as applied to Hong Kong" which we see in art.39 is a phrase that falls to be determined in the context of a domestically binding constitution and is to be interpreted in accordance with the meaning intended by that constitution.
>
> 9. It is true that the Hong Kong Bill of Rights Ordinance (Cap.383) gave domestic effect to the ICCPR. But it gave domestic effect to the ICCPR as already applied to Hong Kong, which is why the Ordinance reservations adopted by the Government of the United Kingdom about 15 years prior to its enactment……
>
> 10. So too, in referring to the ICCPR "as applied to Hong Kong", the Basic Law …… contemplated it as a reference to the application, with reservations, in 1976 of the ICCPR by the Government of the United Kingdom to Hong Kong …… and it contemplated the continued application of that ICCPR to

> Hong Kong beyond 1 July 1997, upon proper authorisation by the Government of the PRC, with those reservations."

42. Andrew Cheung J too emphasized the significant implication of the issue in the context of the challenge against the validity of the immigration reservation:

> "11. This appeal raises some important issues. Amongst them is the one concerning the meaning of the important phrase "as applied to Hong Kong" in art.39(1) of the Basic Law……This issue arises in the context of a challenge, which carries significant implications, against the validity of the "immigration reservation made by the United Kingdom Government when it ratified the International Covenant on Civil and Political Rights (ICCPR) and applied it to Hong Kong in 1976, and of section 11 of the Hong Kong Bill of Rights Ordinance (Cap.383) which (in my view) reflects at the domestic level the immigration reservation, particularly where a guaranteed right that is said to embody or mirror a peremptory norm of customary international law is engaged. The key to determining these questions of validity lies, to a significant extent, in a proper understanding of the phrase "as applied to Hong Kong" in art,39(1) and of how that article works at the constitutional level to give effect to and, at the same time, to delimit the application of, the ICCPR in the domestic courts."

43. In my view, albeit strictly obiter, what the Court of Appeal said in respect of section 11 of the HKBORO was nevertheless intended to be statement of law of general importance.

44. The applicant in *Ubamaka*, represented by Mr Pun (now appearing with Mr Dykes SC in the present case) did not take the Court's above statement of the law lightly either. In his subsequent application for leave to appeal to the Court of Final Appeal, one of the points proposed on appeal was precisely the validity, application and effect of the immigration reservation made by the UK Government in 1976 when it acceded to the ICCPR and applied it to Hong Kong as well as section 11 of the HKBORO. The application for leave, including that on this point, was dismissed on 25 May 2011 (see the written reasons handed down on 31 May 2011).

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.

The Basic Law

52. G also found his claim on Arts.28 and 35 of the Basic Law.

53. Art.28 of the Basic Law reads:

> "The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited."

54. Art.35 provides that:

> "……
> Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

55. G is not Hong Kong resident; and has to derive his right to enjoy the rights and freedoms under this Chapter of the Basic Law pursuant to Art.41 which says:

> "Persons in Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter."

56. The qualification is "in accordance with law". The availability to non-Hong Kong residents of the protection of the rights contained in Chapter III of the Basic Law is subject to the law in force in Hong Kong. "Law" must include the immigration reservation to the ICCPR, now reflected in 11 of the HKBORO, which upon the above analysis is consistent with Art.39 of the Basic Law: see *Santosh Thewe & Anor v Director of Immigration* [2000] 1 HKLRD 717 at 721D-722H; *Gurung Ganga Devi v Director of Immigration*, HCAL 131/2008 (23 September 2009) at §§20-23; 27.

57. In *Re Pasa Danaville Dizon*, HCAL 97/2009 (11 September 2009), Andrew Cheung J (as he then was) said:

> "7. ……it is plain beyond argument that article 35, which applies to Hong Kong residents, does not apply to the applicant directly because she is neither a permanent resident nor a non-permanent resident in Hong Kong……
>
> 8. That said, I believe the applicant still falls within article 41 of the Basic Law which applies to persons in Hong Kong, other than Hong Kong residents. These persons also enjoy the rights and freedom of Hong Kong residents prescribed in Chapter III of the Basic Law "in accordance with law". In this regard, I would say that "law" must include, amongst other things, the Immigration Ordinance."

58. In the case of *MA* (above), Andrew Cheung J (at §§69-73) reiterated the same point (albeit in the context of the right to employment and art.6 reservation to ICESCR). When reading the Basic Law as a whole in order to find out the non-resident's right, one must not overlook Art.39 that stipulates that the provisions of the international covenants "as applied to Hong Kong" shall remain in force in Hong Kong. The immigration reservation to the ICCPR was and still in force in Hong Kong. The general provisions in Art.41 of the Basic Law do not have the effect of getting round that.

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

59. If I am wrong about *Ubamaka* 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 G in the present case. The distinguishing feature, says the Director, is that unlike the applicants in the case of *A*, G was detained since 23 August 2005 pursuant to section 32(2A), not 32(3) or (3A).

60. As mentioned, G requested to return to Pakistan upon his release from prison. He was then detained pursuant to section 32(2A)(a) pending the decision to make a removal order. Steps were taken to push for his removal, including seeking assistance from the Consulate General of

Pakistan and arrangement of air ticket for G. The detention was extended to 19 September 2005 pursuant to section 32(2A)(b).

61. Upon the making of the removal order on 10 September 2005, any further detention of G could only have been based on the exercise of the power under section 32(3A) pending his removal under section 25. However, due to the change of mind on the part of G and the making of the CAT claim, the removal order was never served but withdrawn on 15 September 2005.

62. G was given the notification of the continued detention on 21 September 2005. This time G refused to sign to acknowledge receipt of the document. Yet that did not change the fact that the Secretary sought to detain him pursuant to section 32(2A)(c). That remained to be the situation until his release on 7 October 2005.

63. I do not agree with the contention on behalf of G that once the removal order had been made, though withheld and withdrawn, the Secretary might not revert to section 32(2A) for the authority to detain G pending the decision as to whether a removal order should be made, now in view of the recently raised CAT claim.

64. 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. Reference to the judgments of the Court of First Instance (at §§2; 9-11) and the Court of Appeal (at §§10-11 and 26) lends him support.

65. Mr Dykes SC disagreed. He submitted that in the judgment of the case of *A*, the Court of Appeal made no distinction between the power of detention under sections 32(3)/(3A) and section 32(2A). Reference is made to the fact that the declaration of the Court of Appeal and the subsequent awards of damages in the case of *A* in respect of the unlawful detention cover the periods starting even prior to the commencement of detention under section 32(3) and (3A). Indeed that was the case in respect of 2 out of the 4 applicants there.

66. I note that the Court of Appeal in the case of *A* made clear from the outset (at §§5 and 18) that the appeal did not concern the question of whether the full period of the detention was or was not lawful. The focus of the appeal was the power of detention after the making of the CAT claims; and the terms of the declaration were eventually agreed between the parties along this line (see the further judgment handed down on 18 July 2008). As such, part of the detention periods even under sections 32(3) or (3A) in the case of the other 2 of the 4 applicants was not included in the periods covered by the declaration or the subsequent award of damages.

67. In my view, reference to the period of detention covered by the declaration and the subsequent award of damages in the case of *A* may not provide unequivocal indication one way or the other.

68. G then relies on *Hashimi Habib Halim v Director of Immigration*, HCAL 139/2007 (15 October 2008). By judicial review, the applicant there sought certiorari quashing a decision of the Director to detain him pending his removal from Hong Kong according to the *Hardial Singh* principles. After the application was reserved for decision, the case of *A* was handed down. The case resumed for further argument as a result of that.

69. In the case of *Hashimi*, the applicant also had a prison term to serve. Upon the completion of the term, he was detained pursuant to section 32(2A)(a). The detention then continued pursuant to section 32(2A)(b). He lodged a CAT claim afterwards; nevertheless the detention continued pursuant to section 32(2A)(c). He requested for release on recognizance but was refused. A removal order followed and his detention pending removal under section 32(3A) commenced.

70. As to whether Hashimi's detention following the completion of his prison sentence was unlawful in terms of the decision in *A*, Saunders J described that as arguable (see §28). That said, the Director in that case did not question whether the decision of the case of *A* was or should be read to be confined to the power to detain under section 32(3) or (3A) rather than that under section 32(2A). Instead, it was argued that the steps taken by the Director after the judgment in the case of *A* was handed down sufficed to remedy the defaults in the procedures identified in the case of *A* (see §27). It was on this basis that the Saunders J proceeded to consider whether an originally unlawful detention might be subsequently remedied (see §§28-31); and if yes, whether the steps taken by the Director constituted a lawful detention policy in accordance with the criteria explained in the case of *A*.

71. Assuming with no disrespect that the case of *A* is not clear as to whether the conclusion there was intended to apply to sections 32(3) and (3A) only, I venture to consider 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).

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.

80. The period of detention under section 32(2A) is capped. Nevertheless Mr Dykes SC argued that in the absence of certain and assessable guidelines in respect of how the appropriate length of the detention would be assessed, the statutory limit on the duration under each subsection effectively becomes blanket duration applicable to all.

81. Mr Chow SC took issue that the allegation as to the lack of certain and accessible policy in respect of the duration of detention was not

pleaded. In any event, he submitted that the Court of Appeal in the case of *A* said nothing in support of the alleged need for a policy as to the length of detention. On the contrary, the Court of Appeal held (at §31) that so long as the Secretary was intent upon removing the applicant at the earliest possible moment, and it is not apparent that the removal in a reasonable time would be impossible, the power to detain would in principle be exercisable.

82. As far as the argument for a policy on the length of detention is concerned, I agree with Mr Chow SC's observation. As the Court of Appeal in *Ubamaka* noted (at §170), the learned judge below in that case found the detention of the applicant there to have been unlawful on two *distinct* bases: firstly the detention was for unreasonable period and inadequate reasons; and secondly he was bound by the case of *A*. But by referring to the "transparency on the likely length of detention", the learned judge was arguably referring to the second instead of the first basis. That approach, the Court of Appeal found (at §180), is at odd with the judgment in the case of *A* (at §31).

83. Having said that, 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.

The *Hardial Singh* principles

86. The principles in *Hardial Singh* (at 706C-G) are the common law check on the exercise of the power of administrative detention. The power of detention, though not expressly subject to limitation on duration, cannot be used for any purpose other than pending the making of a deportation order. As the power is given in order to enable the machinery of deportation to be carried out, it is impliedly limited to a period that is reasonably necessary for such purpose. If it becomes apparent that the removal will not be effected within a reasonable time, it will be wrong to exercise the power of detention. The authority should exercise all reasonable expedition to ensure that the steps are taken to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.

87. In approving the *Hardial Singh* principles, Lord Browne-Wilkinson in *Tan Te Lam* (above) (at 111A-E) said that:

> " Section 13D(1) confers a power to detain a Vietnamese migrant "pending his removal from Hong Kong". 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.
>
> Although these restrictions are to be implied where a statute confers simply a power to detain "pending removal" without more, it is plainly possible for the legislature by express provision in the statute to exclude such

> implied restrictions. Subject to any constitutional challenge (which does not arise in this case) the legislature can vary or possibly exclude the *Hardial Singh* principles. But in their Lordships' view the courts should construe strictly any statutory provisions purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances."

88. There is dispute as to whether the *Hardial Singh* principles apply in the present case. In arguing that they do not, Mr Chow SC highlighted the fact that the 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 that was subject to no limitation on duration. As section 32(2A) of the IO is expressly subject to limitation as to both purpose and duration, the principles do not apply. Even if the *Hardial Singh* principles apply in the case of section 32(2A), the power to detain is exercisable and lawfully exercised in the case of G.

89. Assuming the *Hardial Singh* principles apply in the present case, I think the intention of the Director and the Secretary to decide whether to make the removal order should be beyond doubt. As to whether it was apparent that removal would not be effected within reasonable time once G raised his CAT claim; and whether G should and could have been released on recognisance earlier, I think this is arguable on the evidence.

90. Nonetheless, as Saunders J commented in *Hashimi* (at §11), it will only be that, if his detention is lawful in terms of the decision in the case of *A*, the issue of whether or not G's detention is in breach of the *Hardial Singh* principles will arise. In view of my above conclusion in respect of the legality of the power to detain under section 32(2A) because of Art.5(1) of the HKBOR, the issue of the applicability and, if yes, the application of the *Hardial Singh* principles does not arise for a conclusion.

On liability

91. For the above reasons, I conclude that G fails on liability.

On Damages

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

Causation – recoverability of substantial damages

93. In issue is causation in the context of quantum, not liability.

94. 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.

95. 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.

96. The dispute between the parties here lies in: (i) which party bears the burden of proving the causal link between the breach of Art.5(1) of the HKBOR and G's detention, or the lack of it, for the purpose of determining G's entitlement to substantial damages; and (ii) whether the causal link existed or not.

97. Mr Chow SC submitted that the burden of proof is on G. He relied on *Raju Gurung v Secretary for Security and Anor*, HCAL 5/2009 (21 August 2009) at §§61-64, per Saunders J (referring to *R (on the application of KB and Ors) v Mental Health Review Tribunal and Anor* [2003] 2 All 209 and *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] 2 All ER 240).

98. In *Raju Gurung*, Saunders J found that whether the detention policies were established or not, it could not be argued that Gurung would have been released at any time prior to his actual release. Hence the required causal link between the breach of Art.5(1) of the HKBOR and the detention did not exist on the facts of that case.

99. Two things should be noted. First, Saunders J concluded that the claim for damages failed at all, not even entitlement to nominal damages. This apparently went further than what Mr Chow SC is submitting here. Second, the issue of whether the Director or the applicant should bear the burden of proof was not specifically argued in that case.

100. Mr Chow SC also relied on *R(KB)* which, as mentioned, was referred to in *Raju Gurung*. *R(KB)* was a case where the mental patients applied to the relevant tribunal for the review of their detentions under the Mental Health Act. Delays occurred in the hearings of such applications. The patients issued proceedings for judicial review arising out of those

delays. It was held that their Convention rights to speedy hearings had been infringed.

101. The basis of the patients' claim for damages in *R(KB)* must be noted. They contended that had their Convention rights been respected (so that there had been no delay), they could have obtained favourable decisions after hearing of their applications for review earlier. It was on that basis that the English Court said (at §64):

> "…… a claimant must be able to establish a meritorious case that he would have had an earlier favourable tribunal decision by evidence……It follows, in my judgment, 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……"

102. Back to the present case, the circumstances are different. G's complaint is about the legality of G's detention for the lack of certain and accessible grounds and procedure in breach of Art.5(1) of the HKBOR. In principle, G does have to prove the causal link between the breach and his loss of liberty. In practice, this should not be difficult, because the question of whether he would have been lawfully detained arises only if there is evidence of the policy or criterion under section 32 or some other alternative lawful procedure *at the material time* upon which he could have been detained lawfully.

103. Between G and the Director, it should be the latter who would be in a position to suggest and to provide evidence of the policy or criterion that should have been applied in line with Art.5(1) of the HKBOR or the alternative procedure for G's lawful detention. Had such policy or criterion or alternative lawful procedure been known, it would have remained the burden of G to show that he would nevertheless not have

been detained, or at least not for the period that he was actually detained. With those unknown, it would be hard to expect G to contend that he would not have been detained on any other basis. Nor may the court be expected to conclude whether G would have been lawfully detained in any event.

104. Another example is the situation in *WL(Congo)* and *Kambadzi*. In those cases, there was in fact published policy as regards the exercise of the power to detain pending making of the deportation order and removal. 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 therefore able to consider and conclude whether the claimants would have been detained or not, had the known published policy been followed. In the present case, the detention policy or criterion at the material time of G's detention is unknown. The fact was that the detention policy came into existence in October 2008.

105. The case of *A* (damages) helps to shed some light on this issue too specifically with regard to detention of a person like G under section 32. Though the judgment does not suggest that the issue of causation was specifically argued, it was not that the issue was not considered at all. Andrew Cheung J referred extensively to the local case of *Pham Van Ngo v AG*, unrep., HCA 4895/1990 (1993). His Lordship described (at §47) the detention of the Vietnamese refugees in *Pham Van Ngo* 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.

106. 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, such policy not coming into existence until October 2008. The breach in the case of *A* was therefore 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.

107. His Lordship concluded that the assessment of damages must take into account the applicants' loss of liberty as such as one of the element to the claim for non-pecuniary (general) damages. Indeed his Lordship awarded substantial general damages to all the applicants in the case of *A*.

108. Mr Chow SC referred to the background of G and his history including his previous criminal convictions in Hong Kong; and suggested that detention of G would have in any event been reasonable and appropriate. This on the face of the matter may accord with common sense. But in the case of *A*, Andrew Cheung J considered some of these as factors relevant to the award of ordinary damages and whether aggravated or exemplary damages should be awarded as well, rather than the destruction of the causal link and hence the recoverability of substantial damages.

109. As there is nothing to show that G would have in any event been lawfully detained during the period of his actual detention, I am satisfied that he has discharged his burden to prove the causal link between the breach of Art.5(1) of the HKBOR and his detention. In my judgment, but for his failure to establish liability, G would have been entitled to more than nominal damages.

Ordinary damages

110. 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).

111. In the present case, only non-pecuniary general damages are claimed in the sum of HK$200,000.

112. Mr Dykes SC referred to *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, *Rookes v Barnard* [1964] AC 1129 and *R(KB)* (above) for "guidance to approach" to the general level of damages in detention cases. The first 2 cases were also referred to in the case of *A* (damages). Andrew Cheung J considered that as comparables, it should be the local cases that should be referred to; and care should be taken in referring to the level of awards in the English cases in view of the differences in social and economic conditions: see §§53(14)-(15).

113. Mr Dykes SC also referred to the Hong Kong cases of *Faridha Sulistyoningsih v Ma Oi Ling, Karen*, unrep., DCPI 1575/2005 (4 April 2007) and *Godagan Deniyalage Prema C v Cheung Kwan Fong & Anor*, unrep., DCCJ 2488/2003 (20 December 2004). Again both were referred to in the case of *A* (damages). But Andrew Cheung J considered the former to be one of peculiar facts while the latter to be one that should be read with care.

114. 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……"

115. Mr Chow SC submitted that the awards made by his Lordship in the case of *A* (damages) are the most significant for and relevant to our present purpose. They were the most recent, given after a careful review of relevant local awards in the past, in the context of unlawful detention due to the absence of a certain and accessible detention policy, as well as cases involving conditions of detention largely similar to those in the present case. I agree.

116. Mr Chow SC suggested that of all the applicants, the award to applicant "A" in the case of A is relatively the most relevant in terms of the period of detention, i.e., 3 months. I agree. Prior to and after his detention, G had requested to be repatriated. Evidence shows that he had not objected to the detention while the Director was seen taking steps to push for his removal as soon as practicable. Upon securing a new travel document and air ticket, removal order was recommended and eventually made. G changed his mind and made the CAT claim only then. He was released on recognisance a month later.

117. Prior to the commencement of his administrative detention, G had been lawfully convicted and sentenced to a total of 7 months of imprisonment. He was released after serving about 4.5 months. This

serves to somehow diminish the second element of the claim for general damages, namely, damage to reputation, humiliation, shock, injury to feelings as a result of the unlawful detention: see the case of *A* (damages) at §53(6).

118. Circumstances peculiar to applicant "A" in the case of *A* (damages) 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 case of G.

119. The condition of detention is relevant. According to his pleading, G was not allowed to make free telephone calls as he wishes at any time and at any place but subject to prior arrangement with welfare officer. International call was difficult to arrange. It transpires from the evidence that G made 9 free local telephone calls and 1 international call to Pakistan during his detention. There is no record of his request having been turned down. In court, G admitted that he had made no complaint in this regard.

120. It is pleaded that G was provided with no outdoor activities or exercises. He was not able to enjoy sunlight during the detention period. In court, G admitted that he was allowed to play ball games for an hour each day in the basketball court. His complaint became that he did not get to do so because the facilities were being used by the other detainees. He admitted that there was daylight from the sky that could be seen 3 to 4 storeys above his head.

121. Though G suggested occasions of skin condition caused by spicy food served in the Centre, there is no evidence of significant or prolonged suffering that required treatment. The documents show that during his attendance at the hospital of the Centre in late September 2005, medication

and ointment were prescribed. While spice free diet was nevertheless recommended upon his request on that occasion, there was in fact no medical indication that his skin condition was in fact caused by spicy food provided by the Centre.

122. 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 an appropriate award in the present case should be lower. I would have awarded HK$30,000 ordinary damages to G, had he succeeded on liability.

Aggravated damages

123. G claims aggravated damages in the sum of HK$100,000.

124. Aggravated damages, equally compensatory, could only be awarded where there are aggravating features about the case which would result in the victim not receiving sufficient compensation for the injury suffered if restricted to the ordinary award. Factors such as the manner of the imprisonment and the defendant's conduct should be taken into account: see the case of *A* (damages) at §§53(8)-(9).

125. None of the applicants in the case of *A* made out the case for the award of aggravated damages. Considering the circumstances of G, including those discussed above, I come to the same conclusion as regards G's claim for aggravated damages.

Exemplary damages

126. G claims exemplary damages in the sum of HK$100,000.

127. While aggravated damages contain a penal element to the defendant, exemplary damages are definitely punitive. They could be awarded where there was oppressive, arbitrary or unconstitutional conduct by Government servants: *Rookes v Barnard* (above). Yet the fact that the detention was unconstitutional *per se* does not suffice. Outrageous conduct disclosing malice, fraud, cruelty and the like would normally be expected for an award of such damages: see the case of *A* (damages) at §§53(10)-(12).

128. Mr Dykes SC submitted that the detention of G was arbitrary because of the lack of a policy as regards the exercise of the power or review. This, he continued to say, was worse than negligence leading to an oversight in a particular case.

129. Andrew Cheung J in the case of *A* (damages) said (at§67) that:

> "It has to be pointed out that although there was at the time no accessible policy on how the discretion to detain would be exercised, so that in terms of art.5(1) of the Hong Kong Bill of Rights, the detention was "arbitrary", it does not necessarily follow that viewed in light of the individual merits of the case, the detention was capricious or "arbitrary" in the general public law sense."

130. On the evidence, Andrew Cheung J found materials and evidence which tend to justify the Director's or the Secretary's decisions, at the level of individual merits, to detain the applicants in that case.

131. The circumstances of G as referred to by Mr Chow SC were discussed above. It suffices for me to say that at the level of individual merits, the decision to detain G was not such that it could be categorised as capricious or malicious. I find no such elements in the case of G that warrants an award of exemplary damages.

Constitutional damages

132. It is said that G has a cause of action to claim damages for breach of his constitutional rights against arbitrary detention as guaranteed under the Basic Law, the ICCPR and the HKBOR independent from his common law right to claim damages for the tort of false imprisonment. This is his claim for constitutional damages or, as labelled in the authorities, vindicatory damages. He claims HK$400,000 on top of the damages for false imprisonment.

133. By now, claim for vindicatory damages for breach or violation of constitutional rights distinct from common law damages is novel in the local jurisdiction. Mr Dykes SC sought support from Canadian and New Zealand authorities for the proposition that the remedy by damages for breach of a constitutional right exists independently of the tort of false imprisonment.

134. The Canadian case of *Vancouver (City) v Ward* [2010] 2 SCR 28 concerned an arrest and strip search in breach of the Canadian Charter of Rights and Freedom. Section 24(1) of the Charter provides that:

> "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

135. The Supreme Court held that the section was broad enough to include the remedy of constitutional damages for breach of a claimant's Charter rights if such remedy was found to be appropriate and just in the circumstances of a particular case. In his submissions, Mr Dykes SC summarised the test laid down by the Supreme Court in *Ward* as follows:

> (1) Proof of a Charter breach: Section 24(1) is remedial and thus a breach of a constitutional right must be proved in order to claim damages under this head (see *Ward* at §23);

(2) Justify damages award: by showing that the damages sought should be "appropriate and just" to the extent that they serve a useful function or purpose (see *Ward* at §24). The function of compensation recognises that breach of an individual's Charter rights may cause personal loss which should be remedied. The function of vindication recognises that Charter rights must be maintained and cannot be allowed to be withheld away by attribution.

(3) Countervailing factors: once the plaintiff establishes that damages are functionally justified, the defendant may establish countervailing factors which render an award of damages for breach of constitutional rights inappropriate or unjust. Two considerations are apparent: the existence of alternative remedies and concern for good governance (see *Ward* at §33).

136. It is important to note the circumstances in which damages under Art.24(1) of the Charter were awarded in *Ward* as summarised in §68:

> "The state has not established that alternative remedies are available to achieve the objects of compensation, vindication or deterrence with respect to the strip search. Mr Ward sued the officers for assault, as well as the City and the Province for negligence. These claims were dismissed and their dismissal was not appealed to this Court. While this defeated Mr Ward's claim in tort, it did not change the fact that his right under s.8 of the Charter to be secure against unreasonable search and seizure was violated. No tort action was available for that violation and a declaration will not satisfy the need for compensation. Nor has the state established that an award of s.24(1) damages is negated by good governance considerations, such as those raised in *Mackin*."

137. The Canadian Supreme Court also discussed the approach to determining the quantum (at §§ 53-54). In §55, the court said:

> "In assessing s.24(1) damages, the court must focus on the breach of Charter rights as an independent wrong, worthy of compensation in its own right. At the same time, damages under s,24(1) should not duplicate damages awarded

under private law causes of action, such as tort, where compensation of personal loss is at issue."

Hence, the court suggested (at § 59):

"As was done here, the claimant may join a s.24(1) claim with a tort claim. It may be useful to consider the tort claim first, since if it meets the objects of Charter damages, recourse to s.24(1) will be unnecessary. This may add useful context and facilities the s.24(1) analysis. This said, it is not essential that the claimant exhaust her remedies in private law before bringing a s.24(1) claim."

138. Mr Dykes SC also relied on various New Zealand authorities including *Simpson v AG* [1994] 3 NZLR 667; *Maharaj v AG of Trinidad and Tobago* (No.2) [1979] AC 385 (PC); and *Taunoa v AG* [2008] 1 NZLR 429).

139. In *Taunoa*, the New Zealand Supreme Court said:

"255. In undertaking its task the Court is not looking to punish the state or its officials. For some breaches, however, unless there is a monetary award there will be insufficient vindication and the victim will rightly be left with a feeling of injustice. In such cases the Court may exercise its discretion to direct payment of a sum of monetary compensation which will further mark the breach and provide a degree of solace to the victim which would not be achieved by a declaration or other remedy alone. This is not done because a declaration is toothless; it can be expected to be salutary, effectively requiring compliance for the future and standing as a warning of the potentially more dire consequences of non-compliance. But, by itself or even with other remedies, a declaration may not adequately recognise and address the affront to the victim. Although it can be accepted that in New Zealand any government agency will immediately take steps to mend its ways in compliance with the terms of a Court declaration, it is the making of a monetary award against the state and in favour of the victim which is more likely to ensure that it is brought home to officials that the conduct in question has been condemned by the Court on behalf of society.

……

258…… it must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances, taking into account any non-Bill of Rights Act damages which are concurrently being awarded to the plaintiff. It is only if the Court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bills of Rights damages……"

140. Mr Chow SC asked that the New Zealand approach should not be followed. He said this was the view of Andrew Cheung J in the case of *A* (damages) (at § 53(12)). He was referring to the comment by his Lordship that reference to New Zealand authorities was instructive but limited in value in this jurisdiction.

141. As I understand, Andrew Cheung J made his comment after noting that the House of Lords decision in *Rookes v Barnard* (above) was followed in the Hong Kong but not in New Zealand where the law on exemplary damages was notably much more liberal. The context was therefore the approach towards awarding exemplary damages, not whether in principle a distinct award of constitutional damages may be awarded in appropriate circumstances.

142. The Canadian case of *Ward* and the New Zealand case of *Taunoa* were considered by the UK Supreme Court in the recent case of *WL(Congo)* (above). In that case, Lord Dyson JSC referred to, among other cases, the Privy Council decision in *AG of Trinidad and Tobago v Ramanoop* (2006) where the concept of vindicatory damages was explained. The Privy Council (Lord Nicolls) in *Ramanoop* advised that the expression 'punitive damages' or 'exemplary damages' should be avoided as descriptions of this type of additional award of vindicatory damages. (see §§ 97-98).

143. Acknowledging that advice, Lord Dyson had the following to say for the purpose of what he had to decide in *WL(Congo)*, namely, whether the principle of vindicatory damages for violation of constitutional rights should be extended further to the consideration of conventional damages for the tort of false imprisonment:

> "99. It will be seen, therefore, that the Privy Council endorsed the principle of vindicatory damages for violation of constitutional rights. Should this principle be extended further?.....
>
> 100. It is one thing to say that the award of compensatory damages, whether substantial or nominal, serves a vindicatory purpose: in addition to compensating a claimant's loss, it vindicates the right that has been infringed. It is another to award a claimant an additional award, not in order to punish the wrongdoer, but to reflect the special nature of the wrong. As Lord Nicolls made clear in *Ramanoop*, discretionary vindicatory damages may be awarded for breach of the Constitution of Trinidad and Tobago in order to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. It is a big leap to apply this reasoning to any private claim against the executive. *McGregor on Damages*, 18th ed (2009) states, at para 42-009, that "It cannot be said to be established that the infringement of a right can in our law lead to an award of vindicatory damages". After referring in particular to the appeals to the Privy Council from Caribbean countries, the paragraph continues: "the cases are therefore far removed from tortuous claims at home under the common law." I agree with these observations. I should add that the reference by Lord Nicolls to reflecting public outrage shows how closely linked vindicatory damages are to punitive and exemplary damages.
>
> 101. The implications of awarding vindicatory damages in the present case would be far reaching. Undesirable uncertainty would result. If they were awarded here, then they could in principle be awarded in any case involving a battery or false imprisonment by an arm of the state. Indeed, why limit it to such torts? And why limit it to torts committed by the state? I see no justification for letting such unruly horse loose on our law. In my view, the purpose of vindicating a claimant's common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved; (ii) where appropriate, a declaration in suitable terms; and (iii) again, where appropriate, an award of exemplary damages. There is no justification for awarding vindicatory damages for false imprisonment to any of the FNPs."

144. In his speech (§§ 222-237), Lord Collins referred to the cases of *Taunoa* and *Ward* (at §§ 230-231). Then his Lordship had this to say:

> "232. The present claims are not, of course, for constitutional damages. Exemplary damages are available where the executive has acted in a way which is oppressive, arbitrary or unconstitutional……
>
> 233. But this is not a case for exemplary damages falling within the first head of *Rookes v Barnard* [1964] AC 1129. Nor do I consider that the concept of vindicatory damages should be introduced into the law of tort. In truth, despite the suggestions to the contrary in the Privy Council in *Ramanoop* and *Merson*, vindicatory damages are skin to punitive or exemplary damages……
> ……

> 236. To make a separate award for vindicatory damages is to confuse the purpose of damages awards with the nature of the award. A declaration or an award of nominal damages, may itself have a vindicatory purpose and effect. So too a conventional award of damages may serve a vindicatory purpose……
>
> 237. Neither the minority dicta in *Ashley v Chief Constable of Sussex Police* [2008] AC 962 nor the award in *Rees v Darlington Memorial Hospital NHK Trust* [2004] 1 AC 309 justify a conclusion that there is a separate head of vindicatory damages in English law. Consequently I do not consider that there is any basis in the present law for such an award. Nor do I consider that there is a basis in policy for the creation of a head of vindicatory damages at common law, distinct from the existing law of compensatory or exemplary damages. I would therefore restrict the remedy in this case to nominal damages for the reasons given by Lord Dyson JSC."

145. Lord Kerr Made similar observation about the concept of vindicatory damages (at §§ 254-256), including:

> "255. Lord Nicolls' recognition that this type of award covered much the same ground as that involved in exemplary or punitive damages is reflected in the more recent decision of the Privy Council in *Takitota v AG* (2009) 26 BHRC 578 where, at para 16, Lord Carswell said:
>
> > "it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights. When the vindicatory function of the latter head of damages has been discharged, with the element of deterrence that a substantial award carries with it, the purpose of exemplary damages has largely been achieved."
>
> 256. For the reasons given by Lord Dyson JSC an award of exemplary damages is not warranted in these cases. If there is any scope for the award of vindicatory damages where exemplary damages are not appropriate, it must be, in my opinion, very limited indeed. Such an award could only be justified where the declaration that a claimant's right has been infringed provides insufficiently emphatic recognition of the seriousness of the defendant's default. That situation does not arise here. The defendant's failures have been thoroughly examined and exposed. A finding that those failures have led to the false imprisonment of the appellants constitutes a fully adequate acknowledgement of the defendant's default. Since the appellants would have been lawfully detained if the published policy had been applied to them, I agree that no more than a nominal award of damages is appropriate in their cases."

146. Though dissenting, Lord Phillips endorsed what Lord Dyson and Lord Collins said in respect of the concept of vindicatory damages (see §335).

147. Reading the authorities, including those cited above, one can observe the scepticism the UK Supreme Court has about the notion of vindicatory damages for breach of constitutional rights. Even if a distinct award of vindicatory damages is in principle available, such being made for breach of constitutional rights in appropriate cases would be limited in the UK context.

148. In any event, the UK Supreme Court definitely decided against the introduction (or extension) of the concept of such vindicatory damages into the consideration of conventional damages, punitive and exemplary damages included, for the tort of false imprisonment.

149. I discussed above the entitlement of G, as a non-Hong Kong resident and thus pursuant to Art.41 of the Basic Law, to enjoy the rights and freedoms of Hong Kong residents; and such rights would be those as prescribed in that Chapter of the Basic Law and in accordance with law, including immigration legislation which is excepted from the HKBORO due to section 11. I now consider G's claim for constitutional damages on the basis of these provisions of the Basic Law, assuming that I was wrong above.

150. G relies on Arts.28 and 35 of the Basic Law. Art.28 was discussed above. I repeat Art.35 which reads:

> "Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

151. Mr Chow SC pointed out that unlike section 24(1) of the Canadian Charter of Rights and Freedom, the Basic Law, Art.35 included, contains no provision that on its face suggest the right of persons to specifically

claim damages for breach of the rights under the local constitution. As a matter of construction, I agree.

152. G also relies on section 6 of the HKBORO which reads:

> " (1) the court or tribunal-
>
> (a) in proceedings within its jurisdiction in an action for breach of this Ordinance; and
>
> (b) in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant,
>
> may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.
>
> (2)No proceedings shall be held to be outside the jurisdiction of any court or tribunal on the ground that they relate to the Bill of Rights."

153. Section 6 of the HKBORO is a court jurisdiction conferring provision, though the extent of remedy or relief that can be granted and order that can be made under such jurisdiction may well be as wide as that provided in the right of action conferring provision – section 24(1) of the Canadian constitution.

154. What actually provides for a person's right in case of breach or violation of his rights in the present context to seek compensation is Art.5(5) of the HKBOR (under the HKBORO). As mentioned, it provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

155. In *Kambadzi* (above), Lord Hope said (at §§58-59):

> "58.The appellant's alternative claim is that he has an enforceable right to compensation under article 5(5) of the Convention.....
>
> 59. It is agreed on both sides that the article 5 claim adds nothing to the claim at common law if that claim succeeds: see *R(I) v Secretary of State for the Home Department* [2003] INLR 196, per Simon Brown LJ at para 8; *R (Munjaz) v Mersey Care NHS Trust* [2004] 2 QB 395, per Hale LJ ar para 70. Indeed there are reasons for thinking that ..... So, as I would hold that the

> appellant succeeds on his common law claim, I propose to say no more about this alternative, except to note that article 5(5) gives a right to compensation where there has been a contravention of any of the provisions of the article. This would have provided the appellant with a remedy if, although there was a breach of the public law duty to conduct reviews, he was not entitled to claim damages at common law for false imprisonment. As it is, for the reasons I have given, I consider that he is entitled to that remedy and at least to nominal damages."

156. Mr Chow SC submitted that insofar as the right not to be subjected to arbitrary or unlawful detention is concerned, the claim for constitutional damages in the present case in fact adds nothing to G's claim for damages for false imprisonment. As far as the quantum is concerned, there is the further principle against double recovery, even if the separate head of damages is allowed. This is in line with the observation the Canadian Supreme Court (*Ward* (above) at §§34-37); and the New Zealand Court (in *Simpson* (above) at p.678; *Taunoa* (above) at §368). I agree with him.

157. G can seek comparable remedy. That G chose not to seek declaratory relief in the present case is his choice. Borrowing the terminology of Lord Kerr in *WL(Congo)* (at §252), I see no "devaluation of the tort of false imprisonment" by the conventional award of damages (or, if claimed, a declaration as regards his unlawful detention). In my judgment, the case for a separate award of constitutional damages (on top of conventional damages), even if available in principle, is not made out in the circumstances of the present case.

Conclusion

158. 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 G's stay in Hong Kong including the exercise of the power of detention under section 32 of

the IO. In the premises, G cannot found his claim for unlawful detention on the basis of Art.5(1) of the HKBOR.

(2) As a non-Hong Kong resident, by virtue of Art.41 of the Basic Law, G is entitled to enjoy the rights and freedoms of Hong Kong residents, including those under Arts.28 and 35 of the Basic Law, as prescribed and in accordance with law, such law including the immigration reservation to the ICCPR as applied to Hong Kong under Art.39 of the Basic Law and section 11 of the HKBORO. In the premises, G cannot found his claim for unlawful detention on the basis of Arts.28 and 35 of the Basic Law.

(3) In the premises, G's claim must fail and should be dismissed. But for that, G 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.

(4) G would have been entitled to substantial damages, which would be ordinary damages in the sum of HK$30,000. There would have been no award of aggravated or exemplary damages in the circumstances of the present case.

(5) Even assuming that G were entitled to found his claim on the breach of his constitutional rights under Arts.28, 35 and 41 of the Basic Law, there is no basis for making a separate award for constitutional damages for such breach in the circumstances of the present case.

Order

159. Failing on liability, G's claim is dismissed. I make a nisi order that G 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. G's own costs shall be taxed in accordance with Legal Aid Regulations. In the absence of application to vary within 14 days, the nisi costs order shall become absolute.

160. I again thank counsel for their assistance.

Simon Leung
District Judge

Mr Philip DYKES and Mr Hectar PUN instructed by Messrs Yip & Liu for the Plaintiff upon the assignment by the Director of Legal Aid

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

(*) The case of *C & Ors* went on appeal; and the judgment of the Court of Appeal was handed down on 21 July 2011. Among other things, the Court of Appeal agreed with Hartmann J in that the concept of non-refoulement of refugees has developed into the customary international law (§§45-67); but the same has not attained the status of a peremptory norm (§§73-78). The Court of Appeal also agreed with Hartmann J that whatever the position on the international stage, the applicants (appellants) would not be able to assert rights under a customary international law as it is clearly overridden by domestic legislation to the contrary, namely, the IO (§§79-96).