

由此

A

A

B

HCAL 5/2009

B

C

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

C

D

D

E

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

E

F

NO. 5 OF 2009

F

G

BETWEEN

G

H

RAJU GURUNG

Applicant

H

I

and

I

J

THE SECRETARY FOR SECURITY

1st Respondent

J

K

THE DIRECTOR OF IMMIGRATION

2nd Respondent

K

L

L

M

Before: Hon Saunders J in Court

M

N

Dates of Hearing: 19 August 2009

N

O

Date of Judgment: 21 August 2009

O

P

P

Q

Q

R

J U D G M E N T

R

S

S

T

T

U

U

V

V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

The application:

1. In these proceedings Mr Gurung challenges two decisions, the first by the Secretary for Security on 26 February 2008, to detain Mr Gurung pursuant to s 32(2) Immigration Ordinance, (the Ordinance), and second, a decision by the Director of Immigration on 20 August 2008, refusing to release Mr Gurung on recognisance under s 36 of the Ordinance.

2. The grounds of the application are essentially:

(a) the detention is arbitrary and unlawful, for lack of certain and accessible grounds and procedures, and consequently in breach of Article 5(1) of the Hong Kong Bill of Rights, and Article 28 of the Basic Law;

(b) the decision to detain and refuse to release Mr Gurung is wrong on the facts and unreasonable because:

(i) the Director has not shown that concrete arrangements have been made for the removal of Mr Gurung and that his deportation could be effected within a reasonable time;

(ii) wherever removal is not going to be possible within a reasonable time, the detention ceases to be for, and only for, the purpose of effecting removal;

- (iii) the reason given for refusal to release on recognisance, namely that Mr Gurung might constitute a security risk to the community and might abscond/re-offend was fanciful and groundless.

Mr Gurung argues that by reason of the above matters, his detention was unlawful, and consequently he is entitled to damages for loss of liberty.

3. The Respondents' answer to these propositions may be briefly stated as follows:

- (a) the whole period of detention of Mr Gurung may be amply justified under *Hardial Singh* principles, (see *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704), and consequently the decision of the Director to continue to detain Mr Gurung was both lawful and reasonable;
- (b) in any event, from and after 18 October 2008, the Respondents introduced a new and comprehensive detention policy containing sufficiently certain and accessible grounds and procedures, and from that date Mr Gurung's detention cannot be said to be arbitrary or unlawful;
- (c) the decision to detain, and the refusal to release Mr Gurung upon the grounds given was correct on the facts, and reasonable;
- (d) as to damages, there is no causal link between any lack of

certain and accessible grounds and procedures for detention either prior to or after 18 October 2008, and Mr Gurung's detention, and hence there ought to be no damages.

The factual background:

4. Mr Gurung is a Nepalese national. On 6 April 1996, in Nepal, he married a Hong Kong born Nepalese wife. He arrived in Hong Kong on 16 May 1997, as a visitor. He overstayed, and on 26 November 1997, was convicted of the offence of breach of condition of stay. He was sentenced to 1 month imprisonment suspended for two years. He was repatriated to Nepal on 29 November 1997.

5. Mr Gurung returned to Hong Kong on 25 June 1998, and applied for a change of immigration status to remain as a dependent of his wife. His wife had acquired Hong Kong permanent resident status in October 1997. The application was approved on 18 December 1998, and Mr Gurung's permission to stay was extended for a period of 12 months. That period was later extended for a further 36 months, expiring on 18 December 2002.

A second offence:

6. On 8 March 2002, Mr Gurung committed a second offence in Hong Kong. He was convicted of an offence of possession of an offensive weapon in a public place. He was amongst a group of six persons in Tsim Sha Tsui found in possession of weapons including a 3 foot long metal pipe, a wooden baton, a samurai sword and an aluminium pipe. He

pleaded guilty to the charge and was sentenced to 6 months imprisonment.

The first deportation order:

7. A deportation order was made against Mr Gurung on 20 June 2002. He sought a rescission of the deportation order, in the course of which he promised not to offend again. He also obtained leave to challenge the deportation order by judicial review. On 16 April 2004, the Secretary decided to withdraw the deportation order. Mr Gurung was notified of the decision in a letter dated 16 April 2004, which contained the following paragraph:

“I am to advise you that your conviction on the offence of possession of an offensive weapon on 14th February 2002 in a public place has been noted and placed on your immigration record. You are reminded that should you again be convicted in the courts on a criminal charge or otherwise come to adverse attention, your application to continue your stay in Hong Kong will have to be re-assessed. Should you commit and be convicted of a further deportable offence, you must accept that consideration is likely to be given to a new deportation order.”
(sic)

A third offence:

8. On 22 April 2007, Mr Gurung was arrested for an offence of burglary. He had entered a meter room of the building as a trespasser, and stolen a rucksack containing valuable items left by a watchman. Mr Gurung was caught in the street, fleeing from the scene. He was initially remanded in custody, and granted court bail on 10 May 2007. Mr Gurung failed to answer that bail when required, on 4 June 2007. On 17 October 2007, he was convicted on a charge of burglary, a second charge of failing

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

to surrender to custody without reasonable cause being left on file. On the charge of burglary Mr Gurung was sentenced to 14 months imprisonment.

9. On 10 December 2007, Mr Gurung was interviewed at Ma Po Ping Prison with the assistance of a Nepali interpreter. He was then given a “Notice of Consideration of Deportation”, together with an explanatory note, both of which documents were explained to him. On 17 December 2007, Mr Gurung submitted a completed “Grounds Against Deportation” form to the Immigration Department stating that he did not want to go back to Nepal because his wife and son were in Hong Kong, that he was required to take care of his family, and that his son was sick and needed plastic surgery. On 24 December 2007, Mr Gurung’s wife made representations, both by letter and during interview, opposing deportation.

The second deportation order:

10. On 26 February 2008, having considered the representations that had been made, the Secretary issued a deportation order against Mr Gurung, who was released from prison on 27 February 2008. On that day he was detained at the Castle Peak Bay Immigration Centre pending his deportation to Nepal.

11. Prior to 27 February 2008, in anticipation that a deportation order would be made in respect of Mr Gurung, the Director began preparing for that deportation. Initially, Mr Gurung declined to surrender his Nepalese passport or to make application for a travel document for his home passage. Steps were taken to obtain a travel document from the Nepalese consulate, but Mr Gurung’s wife supplied his passport to the

Immigration Department. Funding to procure a plane ticket was obtained, and the reservation was made for Mr Gurung's removal by way of flight RA 410 on 4 March 2008.

12. On that day Mr Gurung refused to leave Hong Kong and made a written statement to the effect that he would appeal against the deportation order. Although Mr Gurung asserted in his Form 86A that he had informed the Director, in writing, of his intention to appeal against the deportation order on 1 March 2008, there is no record of such a document. On 4 March 2008, Mr Gurung signed a short statement in which he stated his intention to appeal against the order for deportation. Upon Mr Gurung refusing to leave Hong Kong the scheduled deportation had to be aborted.

Mr Gurung seeks legal aid:

13. In an interview by an immigration officer on 11 April 2008, Mr Gurung informed the officer that he had applied for legal aid to appeal against the deportation order. On 18 April 2008, the Immigration Department wrote to the Legal Aid Department requesting confirmation as to that application.

14. In fact, on 14 April 2008 the Immigration Department had received a letter dated 10 April 2008 from the Legal Aid Department informing them that the application had been made. Regrettably, that letter did not reach the Deportation Section until 22 April 2008. That letter sought background information from the Immigration Department to enable assessment of the application by the Legal Aid Department. On 22 April 2008, the Immigration Department wrote to the Legal Aid

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
VA
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

Department providing the background information request.

15. On 25 April 2008, the Immigration Department again set in train the procedure to effect Mr Gurung's deportation. On that date application was made for approval of funding to purchase a new air ticket. That approval was duly granted.

The Director presses for removal:

16. On 21 May 2008, the Immigration Department informed the Legal Aid Department that the Director was minded to deport Mr Gurung forthwith, and requested the Legal Aid Department to advise on progress of Mr Gurung's legal aid applications. There was no reply to that letter, and a further enquiry was made on 17 June 2008.

Mr Gurung seeks release on recognisance:

17. On 30 June 2008, Mr Gurung was interviewed by an immigration officer and asked if he had any representations to make in support of a request for release on recognisance. Mr Gurung said that he had made representations in May 2008, and that he was waiting for a reply from the Legal Aid Department. He was asked to provide Immigration Department with those representations as soon as possible.

18. On 4 July 2008, Mr Gurung delivered a letter to the Immigration Department requesting that he not be deported from Hong Kong, and that he be released on recognisance. He gave three grounds for this request:

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

- (a) he had resided in Hong Kong continuously since 1997, his wife and two children were Hong Kong citizens by birth, (in fact his daughter was born in Nepal in December 1996, not in Hong Kong);
- (b) he did not wish to be separated from his immediate family members; and
- (c) he was seeking legal representation with the assistance of the Legal Aid Department and the Bar Association to bring the matter to court, which should take quite a long time to deal with.

19. On 19 July 2008, following enquiry that had been made of Mr Gurung on 15 July 2008, Mr Gurung notified the Immigration Department by letter dated 16 July 2008, that he requested suspension of the deportation order. The same request was made to the Secretary in a letter dated 17 July 2008.

20. The Director still intended to proceed with the deportation of Mr Gurung. On 19 July 2008 enquiry was made by the Immigration Department of the Legal Aid Department as to the result of the legal aid applications. When no reply was forthcoming, on 18 August 2008, the Immigration Department was obliged to contact the Legal Aid Department by telephone, but was unable to obtain information.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
VA
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

Refusal of release on recognisance:

21. On 18 July 2008, the Court of Appeal had delivered its decision in *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752. Following that decision the Director immediately took steps to enhance the criteria and procedures on detention/recognisance, and accessibility to that information.

22. On 23 July 2008, the Director considered Mr Gurung's request to release on recognisance had refused that decision. He did so, relying upon three grounds:

- (a) the deportation order had been made on the basis of Mr Gurung's conviction of a serious offence, and his continued presence in Hong Kong was considered to be undesirable;
- (b) Mr Gurung was a repeat offender, despite the clear warning given to him in 2004 he had committed a further deportable offence in 2007;
- (c) there was no indication that Mr Gurung's deportation could not be effected within a reasonable time.

Review of the detention decision:

23. On 5 August 2008, the Director sought a review by the Secretary of Mr Gurung's detention under s 32(3) of the Ordinance.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
VA
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

24. On 19 August 2008, Director was informed by the Secretary that the Secretary had decided to continue Mr Gurung's detention. Consequently, on 20 August 2008, the Director maintained his previous view that Mr Gurung's request for release upon recognisance should be refused. Mr Gurung was informed by a notice the result of the review which stated that:

- (a) The Director was of the view that Mr Gurung's removal was going to be possible within a reasonable time, because the request for suspension of the deportation order was under process, and there was no indication that deportation could not be effected within a reasonable time;
- (b) the Director was satisfied that Mr Gurung might constitute a security risk to the community if released because he was repeat offender, (breach of condition of stay, one month imprisonment suspended for two years, 1997; possession of offensive weapon in a public place, 6 months imprisonment, 2002; burglary, 14 months imprisonment, 2007), and the two latter offences were serious in nature;
- (c) given that past history, the Director was satisfied that Mr Gurung might abscond and/or re-offend, if released.

25. On 29 September 2008, the Immigration Department made further contact by telephone with the Legal Aid Department and were informed that the applications for legal aid had been refused and that Mr Gurung had lodged an appeal against the refusal, the date of hearing yet to

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
VA
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

be fixed.

26. On 14 October 2008, by memoranda, the Director submitted his comments on Mr Gurung's request for the suspension of the deportation order to the Secretary.

A further revision of the criteria and procedures for detention:

27. On 15 October 2008, the decision of this court in *Hashimi v Director of Immigration*, unreported, HCAL 139/2007, was delivered. As a result of that decision, following an urgent and comprehensive review, on 18 October 2008, significant revisions were made and published by the Director of the criteria and procedures in relation to detention and release on recognisance.

28. On 23 October 2008, a "Notice on Detention Policy" was served on Mr Gurung, and explained to him by an immigration officer with the assistance of a Nepali interpreter. On 29 October 2008, the Director informed the Legal Aid Department that he was minded to deport Mr Gurung forthwith, and requested the Legal Aid Department to let him know the result of the appeals that had been lodged by Mr Gurung against the refusal to grant legal aid.

Progress of the legal aid applications:

29. On 30 October 2008, the Immigration Department were informed by letter by the Legal Aid Department that legal aid had been granted to Mr Gurung, however the letter did not state at all, for which

proceedings aid had been granted. It was necessary for the Immigration Department to telephone the Legal Aid Department to learn that Mr Gurung had withdrawn the legal aid appeals in respect of the intended challenge to the deportation order, and the decision to detain, but that legal aid had been granted in relation to an application submitted in September 2008, to challenge the decision of the Director to refuse to release Mr Gurung upon recognisance. On that same day, the Director sought a further review by the Secretary of the detention of Mr Gurung.

Solicitors are assigned to Mr Gurung:

30. On 31 October 2008, the received a letter from solicitors assigned by the Legal Aid Department to represent Mr Gurung in his intended application for judicial review against the decision of the Director not to release Mr Gurung on recognisance. The letter contained the following statement:

“Although our instructions are limited to the judicial review against the decision of the Director of Immigration of not releasing him from detention upon recognisance, Mr Gurung Raju has during a legal visit on the aforesaid date indicated to our partner Mr Victor Yeung and Counsel Mr Stephen Tang that:-

(1) he was prepared to apply for legal aid from the Legal Aid Department again for an intended application for judicial review against the Permanent Secretary for Security’s deportation order;

(2) if his legal aid application was refused, he would make an appeal against the decision of the Director of Legal Aid;

(3) even without the assistance of legal aid or any legal representation, he was prepared to launch an application they

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

judicial review against the deportation order himself;" (sic)

The Director continues to press for removal:

31. On 10 November 2008, the Immigration Department replied, in writing, to the solicitors. The Immigration Department informed the solicitors that they would monitor Mr Gurung’s situation and render him assistance where it was appropriate. However, the solicitors were reminded that Mr Gurung was subject to a deportation order, and was prohibited from being in Hong Kong. Consequently, the letter said, the Immigration Department intended to proceed with the execution of the deportation order “within short notice subject to no legal impediment”.

Mr Gurung files a CAT claim:

32. On 10 November 2008, the Immigration Department received a letter from Mr Gurung in which he purported to raise a claim under the Convention against Torture, (CAT).

33. I am obliged to say that, on the face of it, the filing of a CAT claim at this stage of the proceedings is remarkable. Mr Gurung had been in Hong Kong for 10 years, since June 1998, and in those 10 years had made no suggestion at all that he might be subjected to torture if he returned to Nepal. He had first been repatriated to Nepal, and then twice been served with deportation orders. On none of those occasions had Mr Gurung suggested that he was at risk of torture if returned to Nepal. The application is sparse in the extreme, even allowing for the fact that it was apparently prepared by Mr Gurung himself, without legal assistance.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

Being lodged at that stage of the proceedings, it bears all the hallmarks of a tactical device.

34. On 11 November 2008, the Immigration Department sought advice from the Legal Aid Department as to whether Mr Gurung had made a new application for legal aid to challenge the deportation. The Legal Aid Department advised on 17 November 2008, that the appeals against refusal had been withdrawn, and the hearing date vacated.

Judicial Review proceedings are commenced:

35. On 16 January 2009, Mr Gurung, by his solicitors, commenced an application for leave to issue judicial review proceedings to challenge, not the decision to deport Mr Gurung, but the decision to detain him and to refuse to release on recognisance. Leave was granted on 23 January 2009, and these proceedings were commenced.

Release on recognisance:

36. On 21 January 2009, following a request made by the Director on 5 January 2009, the Secretary informed the Director that a review of Mr Gurung's detention had been carried out, and the continued detention was not recommended. The Secretary now took the view, having regard to the continued applications for legal aid, the assertions made by Mr Gurung's solicitors in their letter of 31 October 2008, and the institution of judicial review proceedings, that it might no longer be possible to effect the removal of Mr Gurung within a reasonable time.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
VA
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

37. By letter dated 23 January 2009, the Director informed Mr Gurung's solicitors that the Director was prepared to release Mr Gurung on recognisance subject to the provision of appropriate surety and reporting conditions. These conditions were accepted by Mr Gurung, by his solicitors on 29 January 2009, and Mr Gurung was released on that day.

The application:

38. Upon these facts, Mr Tang contends that the detention of Mr Gurung has been unlawful since 10 April 2008, and remained unlawful until his release on 29 January 2009. It will be noted that 11 April 2008 was the day upon which Mr Gurung notified the Immigration Department that he had made application for legal aid to challenge the deportation, (see paragraph 13 above).

The relevant law:

39. The power to detain a person under s 32(3) of the Ordinance is a power to detain a person pending his removal from Hong Kong: A (*Torture Claimant*), at p 762 para 26. The leading authority on the power to detain is that in *Hardial Singh*, which makes it clear that when it becomes apparent that the machinery for removing a person who was intended to be deported may not be operated within a reasonable period, that detention is no longer justified.

40. The determination as to whether or not the Secretary or the Director can reasonably argue that removal may be effected within a reasonable time is a determination that is not assessed with hindsight. The

reasonableness of the decision that removal may be effected within a reasonable time is a determination that must be assessed at each stage of the procedure: see Hartmann J, in *Maheshi v Secretary for Security & Another*, (unreported, 21 August 2008, HCAL 81/2008), see also the decision of Yuen JA in *Maheshi v Secretary for Security & Another*, (unreported, 30 July 2009, HCMP 1337/2009), in which leave to appeal out of time was refused, the judge also saying that there were no reasonable prospects of success on appeal.

41. Consequently, while in hindsight a period during which the Director has been attempting to remove a person may seem, in total, to be unreasonable, that does not determine whether or not, at each particular stage of the procedure the decision of the Director that he may be able to remove the person in a reasonable time was not a justifiable decision.

The failure to challenge the deportation order:

42. Mr Tang was obliged to concede that even now, Mr Gurung has made no application for leave to issue judicial review proceedings to challenge the deportation order. He endeavours to explain that situation by saying that Mr Gurung still awaits a decision from the Legal Aid Department whether or not aid will be granted for such an application.

43. In my view that is no answer. As long ago as 30 October 2008, Mr Gurung asserted that he would bring the proceedings himself, without legal assistance if required. He has not done so. There is no sensible reason in my view why a person who cannot get legal aid cannot file his own application. The courts receive on a daily basis

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

documentation prepared by litigants in person and deal with the matters raised. Mr Gurung knows the decision he wishes to challenge, he knows the grounds upon which he wishes to challenge that decision, and he has elected not to make any challenge.

44. While it would be helpful for Mr Gurung if he has legal aid, the lack of legal aid does not prevent him from commencing the challenge. If there were any merit in the intended challenge to the deportation order, I would be surprised that the solicitors representing Mr Gurung in these proceedings were not willing to assist him on a pro bono basis, so that he might at least come to the court on this challenge, having commenced a parallel challenge to the deportation order.

45. Neither the Secretary nor the Director should be expected, merely because a person says they may make a challenge to a decision, to reach a conclusion immediately, at that time, that it will not be possible to effect removal within a reasonable time. If the challenge is made, it must be met. It may well be that such a challenge will in many cases result in a circumstance where it cannot be said that removal might be effected within a reasonable time. But a mere assertion is nothing more than that, a mere assertion. Until a challenge is formally lodged the Director is perfectly entitled to proceed towards removal, and the absence of a formal challenge will be a significant factor enabling him to reach the conclusion that removal within a reasonable time might be affected. That is especially so when, months after the assertion has been made, no steps have been taken.

46. In my view, Mr Gurung is in fact fortunate that he has been released on recognisance, and his removal deferred, pending these

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

proceedings. This present proceedings, an application seeking a declaration that his detention pending removal is unlawful, and damages for that unlawful detention, is an application that does not require his presence in Hong Kong. Had it not been for the CAT claim, the Secretary would have been fully justified in proceeding to the removal of Mr Gurung from Hong Kong, although these proceedings were extant, in the light of the fact that no challenge had actually been made to the deportation order.

47. The CAT claim having been made, notwithstanding its apparent tactical basis, it must be dealt with, and the Director and Secretary have acted entirely sensibly in recognising that until that claim is dealt with, there is no reasonable prospect of removing Mr Gurung from Hong Kong.

Discussion:

48. The factual scenario set out above shows that throughout the whole of the period during which Mr Gurung was detained, the Director was moving towards his removal. Having regard to all the circumstances I cannot say that it was unreasonable for the Director to hold the view, at each relevant stage of the procedure, that removal would not be possible within a reasonable time. That is particularly so, having regard to the provisions of s 32(4A) of the Ordinance which expressly provides that detention shall not be unlawful if the period is reasonable having regard to all the circumstances affecting that person's detention, including whether or not the person has declined arrangements made or proposed for his removal.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

49. In those circumstances, it is abundantly plain that throughout the whole of the time of the detention Mr Gurung was held “pending removal”. Consequently, in that respect, his detention was, in *Hardial Singh* terms, perfectly lawful.

50. In the decision of the Court of Appeal in *A (Torture Claimant)*, it was held that by reason of the failure of the Director to properly established and publish policies under which the power to detain or released on recognisance, would be exercised, Article 5(1) of the Basic Law was infringed. As I understand that decision, notwithstanding that that detention pending removal might be justifiable in terms of *Hardial Singh* principles, if Article 5(1) is breached, the detention is unlawful.

51. Although contending that the period of detention was justifiable under *Hardial Singh* principles, I did not understand Mr Chow to assert that notwithstanding the absence of appropriate policies between the date of Mr Gurung’s detention, (27 February 2008), and the decision by the Director to revise those policies and take additional steps relation to publication, following the decision in *Hashimi*, (18 October 2008), that period of detention was lawful as not being in breach of Article 5(1). But he did argue that since the revision of those policies and their publication on 18 October 2008, there was no breach of Article 5(1).

52. There have been recent decisions in England where had it has been held that a failure to comply with stated policy would not necessarily turn a detention, which otherwise complied with *Hardial Singh* principles, into a false imprisonment: see *SK (Zimbabwe) v Secretary of State for the Home Department* [2009] 2 All ER 365, and *R (on the application of Abdi*

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

and others) v Secretary of States of the Home Department [2008] EWHC 3166 (Admin), 19 December 2008.

53. I am bound by the decision of the Court of Appeal in *A (Torture Claimant)*. Consequently, while I am satisfied that Mr Gurung's detention under s 32(3) of the Ordinance was, throughout, detention pending removal, and accordingly, that detention was, on *Hardial Singh* principles perfectly lawful, notwithstanding those recent English decisions, by virtue of *A (Torture Claimant)*, I am obliged to find that the detention, from 27 February 2008, to 18 October 2008, was contrary to Article 5(1) of the Basic Law, and consequently unlawful. Mr Gurung is entitled to a declaration in those terms.

54. It is appropriate that I should record that Mr Chow, while not asking me to depart from the law as it is stated in *A (Torture Claimant)*, specifically reserved the right of the Director and the Secretary to seek to raise the recent English authorities should the decision in *A (Torture Claimant)* come under future review.

55. However, I am satisfied that from and after 18 October 2008, not only was the detention lawful on *Hardial Singh* principles, it ceased to breach Article 5(1), by reason of the policies that were then put in place and published.

56. Mr Gurung also challenges the decision to detain on the facts. The argument is that the reasons given for the decision are fanciful and groundless.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

57. Such a challenge is simply not open on judicial review. It is only open to challenge the procedure by which the decision has been reached. The only basis upon which a challenge might be said to be made on the facts as when a decision may be said to be *Wednesbury* unreasonable, (see *Wednesbury Corporation v Ministry of Housing and Local Government* (No. 2) [1966] 2 QB 275, CA). Having regard to the facts in this case, sensibly, that argument was not mounted.

58. Mr Gurung argues that the decision of the Director to refuse to release upon recognisance is unlawful. Throughout the whole of the relevant period, 27 February 2008 to 29 January 2009, I am satisfied that the director was moving to the removal of Mr Gurung, and that he reasonably believed that he would be able to remove Mr Gurung within a reasonable time. No proper argument has been mounted that the decision to refuse release upon recognisance was wrong. The Director properly considered all of the relevant matters, and having regard to Mr Gurung's personal circumstances, the decision is not *Wednesbury* unreasonable.

59. In fact, having regard to the nature of the offences committed by Mr Gurung, and his prior failure to answer bail, a refusal to release upon recognisance, at a time when removal remained a realistic possibility, was simply inevitable. That was the position irrespective of whether or not the Director had in place, and had appropriately published, proper policies in relation to the exercise of his powers.

60. The application for a declaration that the decision of the Director to refuse release upon recognisance is unlawful must be refused.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
VA
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

Damages:

61. The mere fact that a declaration has been made that the part of the period of Mr Gurung's detention was unlawful does not automatically entitle Mr Gurung to damages. It is clear that there must be a causal link between the breach of Article 5(1) of the Basic Law and the detention: see *Kingsley v UK* (2002) 35 EHRR 177 para 40, *R (on the application of KB and others) v Mental Health Review Tribunal & Anor* [2003] 2 All ER 209 and *R (on the application of Greenfield) v Secretary of States of the Home Department* [2005] 2 All ER 240.

62. I accept Mr Chow's submission that there is no causal link between any breach of Article 5(1) and Mr Gurung's detention. Throughout the whole of the relevant period the Director was properly moving towards deportation. It was only because of Mr Gurung's own refusal to accept the arrangements made to effect his deportation, and remaining in Hong Kong in commencing legal proceedings, that he was administratively detained pending deportation. It cannot be said, in circumstances where, as I have found, it was perfectly proper for the Director to refuse release on recognisance, that the failure to have in place, or publish the relevant policies caused Mr Gurung to be refused release upon recognisance. Even following the publication of appropriate policies, the Director was perfectly entitled to refuse release.

63. Quite simply, whether the policies were published or not, it cannot be argued that Mr Gurung would have been released at any time prior to his actual release.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

64. In those circumstances I find no causal link between the breach of Article 5(1) of the Basic Law, and the detention of Mr Gurung. The claims for damages must fail.

Costs:

65. Although Mr Gurung has succeeded in having part of his detention declared unlawful he has failed to achieve an award of damages. The victory is an entirely empty victory. There will be an order nisi that each party will bear its own costs, with Mr Gurung’s costs to be taxed on Legal Aid Regulations.

A final comment:

66. The factual scenario that I have set out above demonstrates a remarkable inability on the part of the Immigration Department and the Legal Aid Department to communicate with each other in respect of applications made for legal aid by persons held in administrative detention. This has the effect of unnecessarily delaying lawful steps such as the removal of a person pursuant to a deportation order.

67. It also appears to take an inordinately long period of time for the Legal Aid Department to reach a conclusion on an application for legal aid on the part of the person who has been detained and who is seeking legal aid to achieve a release from that detention.

68. I have not had the opportunity of hearing from the Legal Aid Department any explanation for their apparent failure to respond to the

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

enquiries made by the Immigration Department, or the barren answers that were given, when a response was finally given, or for the period of time it takes to consider an application. But I am obliged to say that on the information appearing to me from the relevant correspondence, there are good grounds upon which criticism may be made of the Legal A Department, both in respect of the time it takes to process and apparently straightforward application, and in respect of both the speed and the manner in which it responds to an inter-departmental enquiry.

69. Having regard to the importance of individual liberty, the difficulty faced by a private individual, particularly one who is not fluent in Chinese or English, to bring proceedings in the courts for judicial review, it seems to me that there ought to be some form of special liaison between the Immigration Department and Legal Aid Department. This might enable the Immigration Department to be properly informed of steps being taken to challenge decisions made by either that Department or the Secretary for Security. Further, it is very obvious that the Legal Aid Department needs to put in place a form of streamlining so that decisions on applications made by persons detained in seeking a release from detention may be dealt with, with proper expedition.

(John Saunders)
Judge of the Court of First Instance
High Court

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

Mr Stephen Tang instructed by Messers Tso Au Yim & Yeung , assigned by the Director of Legal Aid for the Applicant

Mr Anderson Chow SC, leading Ms Grace Chow, instructed by the Department of Justice, for the Respondents

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V