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HCAL 75/2009

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 75 OF 2009

BETWEEN

ASIF ALI Applicant

and

DIRECTOR OF IMMIGRATION 1st Respondent
SECRETARY FOR SECURITY 2nd Respondent

Before: Hon Andrew Cheung J in Court
Date of Hearing: 9 March 2010
Date of Judgment: 25 March 2010

J U D G M E N T

Facts

1. The applicant, a Pakistani national born in Pakistan, came to Hong Kong as a visitor on 23 May 1997, when he was 16 years old. On 21 August 1997, his immigration status was changed to a dependant of his

father, and he was permitted to remain in Hong Kong on that basis. Thereafter, his permission to remain in Hong Kong was extended on various occasions, and it was last extended to 18 March 2006.

2. Since his first arrival in Hong Kong, the applicant has spent most of his time here.

3. However, the applicant was involved in incidents which eventually led to his arrest by the police on 2 September 2005. He was charged with two counts of wounding with intent. He was granted bail in the Magistrates' Courts, but when his case was transferred to the District Court on 25 November 2005, he was remanded in custody by an order of the court, pending trial.

4. On 30 March 2006, the applicant was convicted after trial in the District Court. He was sentenced to a total of three years' imprisonment on the same day.

5. On 22 November 2007, the Permanent Secretary for Security decided to issue a deportation order against the applicant for life. The applicant's conviction and sentence was a major consideration in the issue of the deportation order.

6. By a letter dated 25 June 2008, the Permanent Secretary for Security refused the applicant's application to rescind the deportation order.

7. The applicant, who was released from prison on 23 November 2007, has since made a torture claim. He has been remaining in Hong

Kong on recognizance, despite the issue of the deportation order, pending the assessment of his torture claim.

8. The issues in the present case arose in this way. On 14 February 2006, whilst the applicant was still remanded in custody pending trial, and with his permission to stay expiring in about a month's time (18 March 2006), the applicant, through the help of an inmate, wrote a letter in the Urdu language, to the Director of Immigration. The letter was addressed to the 25th Floor of the Immigration Tower, where the office of the Right of Abode Section of the Immigration Department is located. It was received by the Immigration Department on 17 February 2006, and was internally delivered to the Right of Abode Section. A translation of the letter in English was made available to the Department on 1 March 2006. The translation reads:

> "Dated 14/02/2006
>
> Director of Immigration Hong Kong 22311-05
>
> Dear Sir/Madam,
>
> With due respect, it is requested that my name, Asif Ali (ID no. [number given] passport travel no.) with place and date of issue, Hong Kong 2001. Respected sir, I have not been granted an unconditional stay yet. And my visa is going to be expired on the 18th of March, next March. Either demanding an extension stay or an unconditional stay, in order to apply for Hong Kong permanent ID, I need your suggestions so that I can rest on aside. I will be obliged to the Sir for this favour or then send me a form which can solve out for me. I should be obliged to you for the rest of my life. I certify this declaration upon reading and listening and signed.
>
> The entire content is a true statement. I put my signature having read it, together with witnesses. Thanks to you. Declarant
>
> Certified holder signature Asif Ali
> I/C [identity card number given]
>
> Witnesses to declaration

Signatures in English and dates."

9. The letter was treated by its recipient as "within the class of public enquiries received by the Department on a daily basis, and was directed to the Information and Liaison Section of the Department for handling" (paragraph 9 of the affirmation of Ho Ka Wing Gavin).

10. On 6 March 2006, the Department replied by letter saying that generally, foreign nationals who were permitted to work, study or reside in Hong Kong should apply for extension of stay within one month of the expiry of the limit of stay if they intended to continue residence in Hong Kong. The letter also informed the applicant of the documents which had to be provided and how the application form could be downloaded from the Department's website.

11. After receipt of the Department's letter of 6 March 2006, the applicant made no application for an extension of stay, nor did he seek further information from the Department. As mentioned, he was convicted and sentenced on 30 March 2006.

Arguments

12. In this application for judicial review, the applicant argues that by the time of his letter of 14 February 2006, he has ordinarily resided in Hong Kong for a continuous period of not less than seven years and has taken Hong Kong as his place of permanent residence. He has thus become entitled to claim the status of a permanent resident in the Hong Kong Special Administrative Region in accordance with article 24(4) of the Basic Law and paragraph 2(d) of Schedule 1 to the Immigration

Ordinance (Cap 115). All that remained for him to do was to make an application for verification of his status as a permanent resident pursuant to section 2AA of the Ordinance and paragraph 3 of Schedule 1 to the Ordinance. The applicant contends that his letter of 14 February 2006 should be treated, as a matter of law, as an application to the Director for verification of his status as a permanent resident.

13. Alternatively, according to the clarification made by Mr Hectar Pun appearing for the applicant at the substantive hearing, the applicant contends that if the letter itself does not amount to an application for verification and cannot be treated as such, the Director has failed to discharge his duty to act fairly by failing to properly advise or assist him to make such an application.

14. The importance of these arguments of the applicant lies in the twin facts that:

(1) As a matter of law, an applicant must have ordinarily resided in Hong Kong for a continuous period of not less than seven years *immediately before* the time when an application for Hong Kong permanent resident status is made in reliance on those seven continuous years: *Fateh Muhammad v Commissioner of Registration* (2001) 4 HKCFAR 278, 284G to 285F;

(2) Again as a matter of law, subject to the *de minimis* rule, a period of imprisonment (after conviction) pursuant to the sentence of a court does not count towards the period of seven continuous years, but would rather break the continuity of the

same: section 2(4)(b) of the Immigration Ordinance; *Fateh Muhammad*, *supra*, at p 284C to F.

15. If the letter of 14 February 2006 was or could, as a matter of law, be regarded as, an application for verification of status, then according to the applicant's argument, he would not be concerned with his subsequent period of imprisonment. The seven continuous years that he would be relying on to support his claim of permanent resident status would be a period immediately prior to 14 February 2006.

16. Likewise, based on his alternative argument, the applicant contends that if the Director had properly and duly discharged his duty to act fairly by assisting or advising him to make an application for verification of his status, on the facts, he would have made an application for verification before 30 March 2006, the day he was convicted and sentenced to a period of imprisonment. In that event, verification of his status would be based on a prior period of seven continuous years unaffected by his imprisonment.

17. The applicant seeks quashing and declaratory relief accordingly.

18. The Director of Immigration, represented by Ms Eva Sit, joins issue with the applicant on his arguments. Furthermore, Ms Sit runs the additional and potentially trumping argument that as a matter of proper construction of section 2(4)(b) of the Immigration Ordinance, the exclusion from the period of seven continuous years relates not only to a period of imprisonment following sentencing, but also to a period of

remand in custody pending a trial, which results in a conviction and a sentence of imprisonment. That being the case, since the applicant was already on remand in custody pending a trial (which eventually resulted in convictions and sentences of imprisonment) on 14 February 2006 when he wrote the letter in question to the Director, he was, on any view of the matter, too late in making an application for verification of status. His period of stay in Hong Kong had, by then, already been tainted by his remand in custody pursuant to an order of the court.

19. These are therefore the issues in relation to the letter of 14 February 2006.

20. In this application for judicial review, the applicant also challenges the deportation order made on 22 November 2007 and the decision of the Permanent Secretary for Security contained in his letter dated 25 June 2008 refusing to rescind the deportation order. However, the only ground relied on in support of the challenge is the contention that the applicant is in fact entitled to the status of a permanent resident of Hong Kong and he has made or should be taken to have made an application for verification within time, so that he cannot be lawfully deported from Hong Kong. That being the case, everything turns on the issues arising from the letter of 14 February 2006.

Detention pending trial

21. I would take the additional issue raised by the Director first, in view of its trumping effect. The question is whether a period of detention pending a trial, which results in a conviction and a sentence of

imprisonment, is an excluded period within the meaning of section 2(4)(b) of the Ordinance.

22. Section 2(4)(b) was the subject matter of judicial observations in *Fateh Muhammad, supra*. That case was also concerned with whether the applicant there had ordinarily resided in Hong Kong for a continuous period of not less than seven years. The applicant there had lived in Hong Kong since the 1960s, but from 27 April 1994 to 27 February 1997, he served a sentence of imprisonment for certain criminal offences (p 282E/F). Before that, he had been remanded in custody pending trial since February 1993 (see the first instance judgment of Keith JA, reported in [1999] 3 HKLRD 199 as *Commissioner for Registration v Registration of Persons Tribunal*, at p 203D/E). At issue was whether imprisonment does not count as ordinary residence and whether the seven years' ordinary and continuous residence must come immediately before the time when the application for Hong Kong permanent resident status is made. In the course of deciding whether imprisonment should be counted as ordinary residence, Bokhary PJ, who gave the leading judgment of the Court of Final Appeal, dealt with a submission made by leading counsel for the applicant there concerning detention (at pp 283A to G, and 283J to 284F):

> "Section 2(4)(b) of the Immigration Ordinance (Cap.115), provides that "a person shall not be treated as ordinarily resident in Hong Kong ... during any period ... of imprisonment or detention pursuant to the sentence or order of any court". This provision has been in the statute book since 1971. In challenging its constitutionality, Mr Philip Dykes SC for Mr Muhammad says that what it catches includes even: detention pending a trial which results in acquittal or the dropping of charges; detention due to mental illness; detention as a debtor; detention pending extradition which eventually fails; detention of an eventually acquitted person due to a refusal by a magistrate of bail which is then granted by a judge; and one day's imprisonment.

As to the last item in that list of Mr Dykes's, I would not like to think that such pointless deprivations of liberty are part of the Hong Kong legal scene. In any event, I would not preclude an argument, whether on the *de minimis* principle by which the law ignores trifles or on some other basis, that a term of imprisonment of that short duration would not defeat an abode claimant. The view might well be taken that such a short period of imprisonment does not interrupt the continuity of residence for the purpose of art.24(2)(4) of the Basic Law and, accordingly, of s.2(4)(b) of the Immigration Ordinance.

Turning to the other items in Mr Dykes's list, I would exclude them from s.2(4)(b)'s ambit on this simple basis. In a provision like s.2(4)(b) "detention" and "order" must, in my view, be read as being of the same nature as "imprisonment" and "sentence" respectively. Accordingly the only kind of detention covered by s.2(4)(b) is detention in a training centre or in a detention centre. (The word "order" in s.2(4)(b) is needed because, although s.4 of the Training Centres Ordinance (Cap.280), speaks of a "sentence of detention", s.4 of the Detention Centres Ordinance (Cap.239), speaks of a "detention order".)

….

No single judicial pronouncement or combination of such pronouncements in regard to the meaning of the expression "ordinarily resident" can be conclusive for the purposes of every context in which that expression appears. But as a starting point at least, Viscount Sumner's observation in *IRC v Lysaght* [1928] AC 234 at p.243 that "the converse to 'ordinarily' is 'extraordinarily'" is, I think, of wide utility. Serving a term of imprisonment, at least when it is not of trivial duration, is something out of the ordinary. Of course it does not mean that a person in prison in any given jurisdiction is never to be regarded as ordinarily resident in that jurisdiction for any purpose. Certainly I would not be disposed to hold, for example, that the fact of being in prison somewhere would of itself render a person not ordinarily resident there when his being so would render him liable to tax.

The present context is a different and somewhat special one. For the question to which it gives rise is this. Does being in prison or a training or detention centre in Hong Kong pursuant to a criminal conviction which has never been quashed and a sentence or order which has never been set aside constitute ordinary residence here when seven years' ordinary and continuous residence here is a qualification prescribed by the Basic Law for attaining a valuable status and right, namely Hong Kong permanent resident status and the right of abode here? In

> such a context, there is a very strong case for saying that residence while serving a substantial term of imprisonment or detention in a training or detention centre is not ordinary residence. So in my judgment: (i) the answer to the question posed above is "no"; (ii) art.24 of the Basic Law is to be construed accordingly; and (iii) s.2(4)(b) of the Immigration Ordinance (construed in the way explained above) is therefore constitutional."

23. Plainly, a period of remand in custody pending trial is not a period of "imprisonment" within the meaning of section 2(4)(b). The true question is whether it is within the meaning of "detention pursuant to the … order of any court" within the meaning of that subsection. According to Bokhary PJ, "detention" and "order" must be read as being of the same nature as "imprisonment" and "sentence" respectively, in the context of section 2(4)(b). Significantly, on that basis, Bokhary PJ observed (at p 283B/C & E/F) that "detention pending a trial which results in acquittal or the dropping of charges" does not fall within the meaning of "detention" pursuant to an "order" of the court in section 2(4)(b).

24. However, this is not what the instant case is about. This case is about detention pending a trial, which results in a conviction and a sentence of imprisonment. Is it in the same nature as "imprisonment" and "sentence"? Or is it in the same league as the examples given by leading counsel for the applicant in *Fateh Muhammad*, mentioned by Bokhary PJ in the passage extracted above?

25. In my view, a purposive approach to construction must be adopted. One must look at the purpose or rationale behind the exception in section 2(4)(b) and ask: why is a period of imprisonment pursuant to a court sentence excluded from ordinary residence in the first place?

26. In this regard, I bear in mind several considerations. The first one is the matter mentioned by Bokhary PJ at pp 283J to 284C (extracted above), that is to say, serving a term of imprisonment, at least when it is not of trivial duration, is something out of the ordinary. While it does not mean that a person in prison in any given jurisdiction is never to be regarded as ordinarily resident in that jurisdiction for any purpose, it does bring into question whether, for the purposes of determining his resident status, a prisoner is ordinarily resident in Hong Kong whilst he is serving his sentence here. Section 2(4)(b) puts the matter beyond doubt.

27. Secondly, imprisonment pursuant to a sentence of the court signifies the lawful deprivation of a prisoner's liberty at the place of imprisonment against his will. In other words, the prisoner is involuntarily kept in the place of imprisonment. And indeed, in many cases, but for the need to make the prisoner serve out his sentence, the host country may well have wanted to deport the person from its territory immediately. Equally, from the perspective of the individual in question, if he had not been caught, convicted and sentenced to imprisonment, he might well have wished to flee the host country to avoid the consequences of his crime. There is simply no guarantee that in every case, the individual would have wanted to prolong his stay in the country or territory in question after the commission of his crime or his arrest. Thus analysed, it is not safe to assume that in every case, a period of imprisonment is necessarily a period of voluntary residence on the prisoner's part in the host country, or a period for which his host country willingly accepts him to be an ordinary resident within its territory. Ordinary residence, as a matter of common law, contains an element of voluntariness on the part of the individual: *R v Barnet LBC, ex p Shah* [1983] 2 AC 309, 343 G/H. That element is

potentially missing in the case of imprisonment. Section 2(4)(b) puts the legal position beyond doubt.

28. Thirdly, as a matter of general principle, no man should be allowed to profit from his own wrongdoing. It would lie ill in the mouth of the prisoner to assert the status of a permanent resident based on seven continuous years' residence by taking advantage of his time of imprisonment in Hong Kong. It would simply offend one's sense of what is right and fair.

29. Bearing those considerations in mind, it is not difficult to see why the drafters of the Basic Law and the legislature in enacting section 2(4)(d) have chosen to exclude any period of imprisonment pursuant to a sentence of the court from counting the period of seven continuous years.

30. It is also considerations of this kind which provide the reasons for not excluding from the period of seven continuous years the various examples cited by leading counsel for the applicant in *Fateh Muhammad*, discussed by Bokhary PJ in the extract from that case.

31. In my view, the answer to the issue raised in the present case is plain. What is in issue here is a period of detention pending a trial, which results in a conviction, and a sentence of imprisonment. The detention is, by definition, due to the commission of the offence, which the individual is subsequently convicted of. The detention is the result of his own wrong. It is against his wish and can hardly be described as ordinary. If he had had a choice, he might well have wanted to leave Hong Kong

instead. If the Hong Kong SAR Government had had the foreknowledge that he would be found guilty at trial and sentenced to a period of imprisonment, and if it had not been for the need (for obvious public policy reasons) to make him serve out his sentence of imprisonment, the Government would probably have wanted to deport or remove him from Hong Kong there and then. In that sense, his being allowed to remain in Hong Kong is involuntary from the perspective of Hong Kong as well.

32. His case is therefore quite different from the case where a person is detained pending a trial which results in acquittal or the dropping of charges, and from the other examples discussed by Bokhary PJ in *Fateh Muhammad*. Rather, the detention under consideration is in the same nature as imprisonment pursuant to a sentence of the court for the purposes of section 2(4)(d). Indeed, section 67A(1) of the Criminal Procedure Ordinance (Cap 221) provides specifically that the length of any sentence of imprisonment imposed on a person by a court shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to the sentence or the offence for which it was passed, or with any proceedings from which those proceedings arose.

33. Mr Pun for the applicant argues, by reference to *Chan Hung v Commissioner of Correctional Services* [2000] 3 HKC 767, that section 67A(1) does not turn a period of remand into a period of imprisonment, or deem a sentence to begin on the date of remand, but rather reduces the sentence passed only.

34. I fully accept what has been decided in *Chan Hung* as representing the correct reading of section 67A(1). However, the argument misses the point. The question here is not whether a period of detention pending trial can be equated with a period of imprisonment. Rather, the all-important issue is whether, for the purposes of section 2(4)(b), such detention is "of the same nature" as imprisonment pursuant to a sentence imposed by a court after conviction. The reference to section 67A(1) in the present context is to reinforce the point that the two are indeed of the same nature, for the purposes of section 2(4)(b).

35. Ms Sit for the Director refers this Court to *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26, a case concerning a period of imprisonment of two weeks and whether the *de minimis* principle applies to such a short period of imprisonment. Ms Sit rightly points out that Bokhary PJ, in paragraph 18 of the judgment in that case, appears to have treated the period of remand pending trial in *Fateh Muhammad* as part of the excluded period in counting the seven continuous years of ordinary residence.

36. However, it is plain that the point under consideration in the present case was not in issue in *Prem Singh* and his Lordship, when giving a very brief summary there of what the Court of Final Appeal had decided in *Fateh Muhammad*, was not dealing with the very fine distinction that the Court is faced with. I do not base my decision on what was said about *Fateh Muhammad* by Bokhary PJ in *Prem Singh.*

37. For all the above reasons, I conclude by way of interpretation of section 2(4)(b) that subject to the *de minimis* principle, a period of

detention pending a trial, which results in a conviction and a sentence of imprisonment, is a period of "detention" pursuant to an order of the court, within the meaning of section 2(4)(b) of the Immigration Ordinance. Such a period is to be excluded in counting the period of seven continuous years of ordinary residence.

38. That being the case, irrespective of the applicant's arguments based on the letter of 14 February 2006, he was not a person entitled to make a claim of Hong Kong permanent resident status (by making an application for verification of his status) at any time after his detention pending trial pursuant to the order of the District Court made on 25 November 2005. He was, in short, simply too late when he wrote his letter of 14 February 2006. Regardless of any breach by the Director of his duty to act fairly (if any), any relief must be denied as he was and is not entitled to claim the status of a permanent resident in Hong Kong.

39. In those circumstances, I can be brief with the arguments arising from the letter of 14 February 2006.

Letter as an application for verification of status

40. The first argument relates to whether the letter of 14 February 2006 was, or should be regarded as, an application for verification of status. This raises two sub-issues. First, whether as a matter of law, an application for verification of status must be made by means of a standard form prepared by the Director and/or be accompanied by the supporting information required by paragraph 3(1) of Schedule 1 to the Ordinance. Secondly, whether on the facts, the letter was, or should be taken to have been, an application for verification.

41. On the first sub-issue, I have no doubt that the answer is in the negative. Nothing in the Immigration Ordinance, including in particular the provisions in Schedule 1, requires an application to be made in a prescribed form. By way of contrast, paragraph 3(1)(b) of Schedule 1 specifically requires that the declaration that the applicant for verification has taken Hong Kong as his place of permanent residence shall be in a form stipulated by the Director. Indeed, in *Prem Singh, supra*, the Court of Final Appeal regarded, on the facts of that case, a letter asking for an unconditional stay as constituting an application for verification of the status of a permanent resident: see paras 2, 12, 13, 50(c), 85 to 95. In this regard, the Court must look at the substance, rather than the form, of the matter.

42. It is true that the Director is entitled to require the applicant to supply information in support of his claim of status. Indeed, paragraph 3(1)(a) of Schedule 1 sets out the information to be furnished. However, it does not follow that all the information must accompany the initial application, in order to make the application a valid one for verification of status.

43. Turning to the second sub-issue, on a fair reading of the letter of 14 February 2006, I take the view that it does not – but just by a small margin – amount to an application for verification of status. Rather, it is a letter asking for assistance and help from the Director so that the applicant can, in due course, make an application for a permanent identity card. His reference to his intention to apply for a permanent Hong Kong identity card must, in the present context, be understood as his assertion that he is entitled to claim the status of a permanent resident (of course, only a

permanent resident is entitled to a permanent identity card). There is a small, yet significant, difference between intending to do something in due course and doing it here and now.

44. Ultimately, it is a matter of impression. For my part, the letter tells the Director, in substance, that the applicant's position is that he is already entitled to claim the status of a permanent resident and he will apply for the issue of a permanent Hong Kong identity card in due course. However, there is no present application to the Director for verification of his status. Rather, the Director is asked to assist the applicant in order to enable the applicant to make his application in due course. He asks for advice and he asks for the right forms to fill in. That is, in substance, what he says in his letter.

45. Therefore, on this first alternative basis on which the applicant puts forward his case in relation to the letter of 14 February 2006, I am not with him.

Duty to act fairly

46. However, on his alternative argument, namely, that the Director has failed to discharge his duty to act fairly by properly and duly assisting and advising him to make an application for verification of his status, I am with the applicant.

47. Again, this raises several sub-issues. First, whether the Director owes such a duty and what the scope of that duty is. Secondly, whether, on the facts, such a duty (if any) has been breached. Thirdly, causation and relief.

48. On the first sub-issue, Ms Sit accepts at the substantive hearing that as a public authority and a decision-maker, the Director has to act fairly. But his duty to act fairly must be viewed in the context of the decision or discretion that he has to make or exercise, or the function he has to perform.

49. I have no difficulty with this proposition. I said something along the same lines in *Naseer Ahmed v The Director of Immigration*, HCAL 76/2008, 5 December 2008, para 34. I made those observations in the course of distinguishing that case that I was dealing with from the Court of Appeal's decision in *Somporn Yoothip v Secretary for Security*, CACV 276/2006, 22 June 2007 (a case turning on the duty to act fairly on the part of the Commissioner of Registration based on the Basic Law, the Immigration Ordinance, the Registration of Persons Ordinance (Cap 177) and the Registration of Persons Regulations made thereunder). In the present case, notably, one is not concerned with the duty on the part of the Commissioner of Registration in the context of an application for the issue of an identity card. What is in issue is whether the Director of Immigration owes a duty to act fairly in the context of his responsibilities under the Immigration Ordinance.

50. Under the Ordinance, the Director has various responsibilities. They include, amongst other things, the grant of an extension of stay and the verification of an applicant's claim of the status of a permanent resident.

51. I have no doubt that in relation to both functions, the Director has to act fairly in discharging them.

52. As to the scope of the duty, it must turn on the facts. This brings me conveniently to the second sub-issue, that is to say, whether there is a failure to act fairly in relation to the letter of 14 February 2006. The two matters can be dealt with together.

53. In my view, there has been such a failure, in terms of rendering proper assistance and advice to the applicant to make an application for verification of his status. As I said, on a fair reading of the letter as translated, the applicant is saying to the Director, in substance, that he will make an application for the issue of a permanent identity card in due course. He asks the Director for "suggestions" or the right forms. He is, in substance, asking for help from the Director, so that in due course, he can make an application for the issue of a permanent identity card. He is, in effect, asserting that he is entitled to claim the status of a permanent resident.

54. I fully accept that the Director does not act as the legal adviser to the general public regarding immigration matters. I also accept that the Director and his officers have an extremely heavy workload, and on a daily basis, they deal with enquiries and applications of many different kinds and in great quantities. Yet I cannot accept that the Director is entitled simply to ignore what the applicant has told him in his letter of 14 February 2006, and can simply reply by giving him general information on how to make an application for an extension of stay, as if the letter had mentioned nothing but the expiry of visa. Indeed, the very fact that the Director has decided to provide information on the requirement and procedure for applying for an extension of stay shows that even the Director accepts that he has a duty, as part of his duty to act fairly in the

performance of his responsibility to grant extensions of stay, to properly answer relevant enquires and requests for assistance.

55. The letter of 14 February 2006, it should be remembered, was addressed to the 25th Floor of the Immigration Tower where the office of the Right of Abode Section of the Immigration Department is located. The applicant gave his identity card number in the letter. A check with his records kept in the Department would have revealed that the applicant had been spending most of his time in Hong Kong as a resident since 1997. *Prima facie*, his claim of an intention to apply for a permanent identity card, and his implied assertion that he was entitled to claim permanent resident status, were entitled to serious consideration. In this regard, it has to be remembered that the status of a permanent resident in Hong Kong, carrying with it the right of abode, is a valuable and important right, to a person who has spent many years in Hong Kong, treating it as his home. When such a person writes to the Director seeking assistance, he is entitled to a helpful answer.

56. It does not mean that the Director has to vet the person's status there and then. Nor does it mean that the Director has an onerous obligation to discharge when giving a reply. In my view, in the circumstances of the present case, a proper reply by the Director to the applicant would have been to give him general (standard) information on the requirement and procedure for making an application for verification of the status of a permanent resident, and to tell him that upon successful verification, he could apply to the Commissioner of Registration for the issue of a permanent identity card. A helpful letter of reply would have enclosed a copy of the standard form for making an application for

verification. Or, the letter of reply could have referred to the appropriate web page where the form could be downloaded. Beyond that, on the facts of this case, the duty to act fairly does not require the Director to say or do anything.

57. On the facts, the Director was not entitled to wait until a follow-up letter from the applicant was received before advising him of the requirement and procedure for the making of an application for verification of his status. To suggest otherwise would be to put the cart before the horse.

58. For these reasons, I take the view that the Director has failed to act fairly, in relation to his statutory function to verify claims of the status of a permanent resident.

59. However, even leaving aside the construction issue concerning section 2(4)(b), this would not be the end of the matter. One would still have to ask, as a third sub-issue here, what would have happened to the applicant's case if the Director had properly advised and assisted him. Would he have made an application for verification in time (ie before 30 March 2006 when he was convicted and sentenced to imprisonment)? On this issue, there is no direct evidence. Mr Pun asks the Court to draw an inference in his client's favour. Ms Sit for the Director urges the Court to take into account the whole history of the matter, particularly the inaction of the applicant after receipt of the Director's reply letter dated 6 March 2006.

60. On reflection, I accept Ms Sit's argument. The undeniable fact is that notwithstanding the receipt of the 6 March 2006 letter, the applicant did nothing, that is to say, he did not even make an application for extension of his permission to stay, even though it was going to expire on 18 March 2006. In fact, as from 18 March 2006, the applicant became an overstayer, and he would not be regarded as ordinarily resident in Hong Kong by reason of section 2(4)(a)(ii) of the Ordinance (irrespective of section 2(4)(b)).

61. The burden of proof is on the applicant to establish real prejudice by reason of the breach that he complains about. On the totality of the evidence before the Court, I am unable to draw the inference that, more probable than not, had the letter of 6 March 2006 from the Director been more helpful and informative, the applicant would have made an application for verification of status in time, that is to say, before 30 March 2006 when he was sentenced to imprisonment, or, still worse, before 18 March 2006, when he became an overstayer (in the absence of a successful application for an extension of stay).

62. For this reason, I take the view that all these arguments arising from the letter of 14 February 2006 would take the applicant nowhere. Relief would have to be denied notwithstanding the technical breach that he had managed to establish, even if I had decided the construction issue regarding section 2(4)(b) of the Immigration Ordinance in a different way.

Outcome

63. For all these reasons, the application for judicial review must fail. It is dismissed. The parties are agreed that costs should follow the

event. I order that the applicant pay to the respondents their costs of these proceedings, including all costs previously reserved, to be taxed if not agreed. I further order legal aid taxation in respect of the applicant's own costs.

64. I thank counsel for their assistance.

(Andrew Cheung)
Judge of the Court of First Instance
High Court

Mr Hectar Pun, instructed by Yip & Liu, for the applicant
Ms Eva Sit, instructed by the Department of Justice, for the respondents