HCAL 139/2007

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

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 139 OF 2007

BETWEEN

HASHIMI HABIB HALIM Applicant

and

DIRECTOR OF IMMIGRATION Respondent

Before: Hon Saunders J in Court
Date of Hearing: 9 September 2010
Date of Judgment: 12 November 2010

J U D G M E N T

Background:

1. The factual background to these proceedings is set out in paragraphs 12-22 of the judgment delivered by me on 15 October 2008. In that judgment I held that Mr Hashimi's detention was unlawful, and I ordered that he be released on recognizance with the remaining aspects of the application for judicial review being adjourned sine die with liberty to apply.

2. The particular decision now under challenge was dealt with in paragraph 22 of that judgment in the following terms:

> "On 13 February 2007, a removal order was made in respect of Mr Hashimi under s 19(1)(b) of the (Immigration) Ordinance (Cap 115) upon the ground that he had landed in Hong Kong unlawfully. On the same day he was detained pending removal pursuant to s 32(3A) of the Ordinance. That subsection provides:
>
> > "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."
>
> Section 25 provides the machinery by which a removal order under s 19 is carried out. There is no evidence that a deportation order was ever made. Nothing turns on that fact."

3. By consent, on 15 April 2010, I directed that the application by Mr Hashimi for an order of certiorari challenging the validity of the removal order be set down for argument. That argument was heard on 9 September 2010.

4. In his Form 86A setting up the grounds of challenge the following assertions were made, (these are not verbatim, except where indicated, as the grounds were "home-made", but reflect the essence of the

assertions:

(1) The statutory period of 24 hours provided under section 19 (5) of the Ordinance for the subject of a Notice of Removal Order to take the requisite steps to appeal against the Removal Order is somehow "tailored to be such to put the detainee at a disadvantage, maximising his chances of failure, compounded by denial of any legal assistance in the course to assure desired objectives", so as to "amount to an act of impropriety" (sic).

(2) The Immigration Tribunal's determination of the Applicant's appeal in his absence and in the absence of legal assistance to him was reached "unreasonably".

5. Mr Wilson Chan does not pursue these grounds, sensibly for they are manifestly bad. Instead the following arguments are raised, as correctly summarised by Mr Abraham Chan:

(1) the Removal Order is invalid as the Notice of Removal Order and Right to Appeal dated 15 February 2007 did not specify any country to which Mr Hashimi would be removed: (the Specified Country Argument);

(2) having decided against making a Deportation Order under s 20 of the Ordinance, the Director has acted "irrationally" by making a Removal Order under s 19(1)(b) of the Ordinance: (the Irrationality Argument);

(3) the "uncertainty" regarding Mr Hashimi's nationality and the Director's inability to name a 'specified country' to which Mr Hashimi could be removed under s 25 of Ordinance were

material factors which the Director failed to consider when exercising his discretion to make the Removal Order: (the Uncertainty Argument):

(4) the "position prevailing" at the time of this adjourned hearing is that removal from Hong Kong is no longer a real possibility such that the removal order should not be left hanging over the head of Mr Hashimi: (the Prevailing Position argument);

(5) there are "real doubts" as to the lawfulness of the Removal Order, since this was made for the alleged ulterior motive that "without an order being made on that day, the power to detain Mr Hashimi under s 32(2A)(c) of the Ordinance would expire": (the Ulterior Motive Argument).

6. Mr Abraham Chan quite rightly points out that none of these arguments were contained or even foreshadowed in the Amended Form 86A, and that there is no application for leave to amend. He invited me to refuse leave to amend if it were sought. Mr Abraham Chan is quite right when he says that it is now firmly established that a late attempt to widen the scope of judicial review proceedings should rarely be acceded to: *Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp*, (unreported HCAL 12/2009, 21 September 2009) and *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 per Litton PJ at 340.

7. While that is entirely right, I had regard to the fact that at the time Mr Hashimi filed his amended Form 86A he did not have the benefit of legal advice. In circumstances where the liberty of a citizen is at stake, or where a person faces removal from Hong Kong, I am of the view that it

is open to the court to take a more liberal view of the position and not to strictly apply time limits against an applicant. I accordingly allowed the arguments to be made.

The Specified Country Argument:

8. It is important to remember that there are three stages in the removal of the person under the Ordinance. First, a removal order is made pursuant to s 19(1). That is the decision that is under challenge in these proceedings. Second, notice of that removal order is given to the subject informing him of the ground on which the order is made and his right of appeal: see s 19(5). Third, the physical steps to effect that removal are taken under s 25. In so far as a specified country can be named when the actual removal comes to be effected under s 25, it will be necessary to fulfil the requirements of that section.

9. The contention that upon making the removal order under s 19(1) a particular country must be specified cannot succeed. First, there is no requirement in s 19 that a country must be specified. Second, I accept Mr Abraham Chan's submission that the argument leads to an absurd result. If the Director is sure that the person has unlawfully landed in Hong Kong, and hence a removal order is justified pursuant to s 19(1)(b), but that person has refused to say where he comes from, or has otherwise been uncooperative in that respect, then it will be impossible for the Director to specify a country to which the person may be removed. That simply cannot be right.

10. The absurdity of the situation is graphically illustrated by the present case where Mr Hashimi has adopted the various positions in

respect of his nationality. On 19 September 2006, in opposing deportation on grounds of questionable nationality, he was only prepared to say that he had no claim to Bangladeshi nationality. At that time he did not assert any other nationality.

11. On 14 November 2006, having asserted on 31 October 2006 that he was "Indian by birth and in heart and I just endeavoured to stick to my roots that I am an Indian", he refused to fill in a form to apply for an Indian passport. On 2 February 2007, he refused to answer questions as to whether he was Bangladeshi or Indian, and on 3 February 2007, insisted that he was Indian.

12. He is unable to assert that he is a stateless person, as the position of the Consulate General of India is that it has been unable to confirm its final position on his citizenship claim. The Consulate General seeks supporting documents to substantiate the citizenship claim, which Mr Hashimi has not yet provided. Mr Hashimi described his position in his Torture Convention Questionnaire in the following terms:

> "...in future the I cannot speculate about nor I can rule out details of (additional documents shedding light on my status)..... if any it would take considerable time due to long absence from the respective countries such as India and Pakistan." (sic)

13. Finally, I have regard to the following passage from the decision of the Court of Appeal in *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 at §21:

> "We agree with Mr. Chow that while the making of the removal or deportation order (we use the terms interchangeably) has the immediate effect of requiring the person who is subject to the order to leave Hong Kong, it does not require that person to go to any particular country. Nor does it oblige the Director of

> Immigration (the Director) to immediately send that person to any particular country."

As Mr Abraham Chan put it, the passage, cited for Mr Hashimi is critically against him.

14. I accordingly reject the Specified Country argument.

The Irrationality Argument:

15. The submission made is that it is irrational for the Director, having abandoned the intention to make a deportation order under s 20 of the Ordinance, to then make a removal order under s 19, several months later.

16. Mr Wilson Chan acknowledges that the criteria for making a deportation order were undoubtedly satisfied. The evidence does not establish, (because the ground was not advanced at the time the Director filed his affidavits), precisely why a removal order was made and a deportation order was not made. But it is plain that so long as the Director has followed proper procedures, the issue in these proceedings, it was open to the Director to make either a deportation order or a removal order.

17. The submission of irrationality, made without the support of either authority or useful argument, proceeds upon what Mr Abraham Chan correctly described as a glaring non-sequitur. Simply because a decision is made by the Director not to have recourse to a s 20 deportation order, it does not follow that there is no rational basis for relying on a separate substantive provision, a s 19 removal order, some months later. Mr Wilson Chan did not attempt to support the submission with argument

other than to assert the submission. For the reasons advanced by Mr Abraham Chan the submission is fundamentally flawed.

18. I reject the Irrationality Argument.

The Uncertainty Argument:

19. If there can be no duty upon the Director to specify a particular country at the time the removal order is made, then plainly any uncertainty as to which country a person might be removed at the time of the making removal order must be irrelevant. That alone is sufficient to deal with the argument.

20. The removal order was made on 13 February 2007. Already at that time it was plain that there were questions about Mr Hashimi's nationality which was consequently uncertain. His conduct prior to the making of the removal order is set out in paragraph 10-11 above. That conduct must inevitably have placed the issue of Mr Hashimi's nationality in the mind of the decision maker when making the removal order. Plainly, the decision maker would have been aware that Mr Hashimi's nationality was uncertain.

21. In those circumstances I accept Mr Abraham Chan's submission that reliance upon the judgment in *Yin Xiang-jiang v Director of Immigration* [1994] 2 HKLR 101 is entirely misplaced. First, the court in that case was not considering a removal order. Second, the court was only concerned with the question of leave to apply for judicial review and was examining only potential arguments. Third, and most importantly, there was evidence in the case that the decision maker had deliberately

shut his mind to any consideration based on the nationality, or absence of nationality, of the applicants in that case. The evidence in Mr Hashimi's case is completely to the contrary.

22. Finally, there is no obligation upon the Director to consider matters beyond those expressly identified in s 19, see *Yu Ah Wing v Director of Immigration* [2000] 1 HKLRD 365. There being no express requirement in s 19 to specify a particular country to which a person might ultimately be removed, there can be no requirement on the Director to place weight on that consideration at the time the removal order is made.

23. I accordingly reject the Uncertainty Argument.

The Prevailing Position Argument:

24. It is argued for Mr Hashimi that in considering the validity of the removal order, and whether or not it should remain in force, the court should take into account the position prevailing at the time of the hearing, September 2010, and that it would not be right or fair for the removal order to be hanging over the head of Mr Hashimi indefinitely.

25. I accept Mr Abraham Chan's submission that the orthodox judicial review grounds of unlawfulness and irrationality depend necessarily on an evaluation of the situation prevailing at the time of the decision: see Fordham, Judicial Review Handbook, 5th Edn, at 31.2.

26. The reliance of Mr Wilson Chan upon three paragraphs in the decision of Reyes J in *Ubamaka Edward Wilson v Secretary for Security* (unreported, HCAL 77/2008, 5 May 2009), is misplaced for the reasons

advanced by Mr Abraham Chan. The material question in that case was not one of the validity of the decision-making or the reasoning process leading to a deportation order, but the constitutionality of the order in itself. The difference is crucial, because where questions of constitutionality and fundamental rights are raised, the focus is not on the decision-making process, but simply on whether the applicant's rights have been violated: see *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420.

27. There is no argument in the present case that the removal order is incompatible with any of Mr Hashimi's fundamental rights.

28. As part of this argument it is said that it is not fair for the order to be hanging over the head of Mr Hashimi indefinitely. There is no challenge, indeed there can be no challenge, to the merits of the order that has been made. The challenge can only be one to procedure. If the removal order is to be set aside, presumably leaving it open to the Director, ultimately when Mr Hashimi's nationality is established, to issue a new removal order, it would be open to Mr Hashimi to say that there being no removal order, he had a reasonable expectation that he would not be removed. That would be a quite false expectation, but one which, in the absence of a removal order, would be open to argument.

29. It would be quite irrational to set aside an entirely justified removal order simply because there will be a period of time, presently unascertainable, before which that removal may be effected. It is right that in that sense the order constitutes a sword of Damocles, but that is a situation that arises not through the acts of the Director, but as a consequence of Mr Hashimi entering Hong Kong illegally, and committing

a serious offence, in circumstances where he is unable to establish his nationality. It certainly does not provide a basis upon which the order ought to be set aside.

30. I accordingly reject the Prevailing Position Argument.

The Ulterior Motive Argument:

31. The submission made by Mr Wilson Chan was that "there are real doubts as to whether the Removal Order was lawfully made in the first place."

32. The submission seems to be based on an argument that, Mr Hashimi not having been notified of the removal order until two days after it was made on 15 February 2007, the requirement in s 19(5) that written notice of the order be served on the person "as soon as is practicable", has not been met. There is no suggestion that Mr Hashimi was prejudiced in any way by that two-day period. There is nothing in the evidence to suggest that it was practicable to serve the order on Mr Hashimi earlier. In any event, no suggestion was made as why the two day period was outside the scope of the expression "as soon as practicable".

33. The submission seemed to be founded in an unstated assertion that as Mr Hashimi was in custody, the removal order, to be served as soon as practicable, must be served upon him virtually immediately it was made. There is no sensible basis for such a requirement and service within two days, in the absence of any evidence to the contrary, or as to any prejudice suffered adequately meets the requirements of the Ordinance.

34. It is entirely beside the point that on 16 February 2007, the Director should write to the Consulate General of Bangladesh urging them to expedite the verification process and to issue a replacement travel document to Mr Hashimi as soon as possible. A travel document would be necessary to physically effect his removal, and at that stage Bangladesh seemed to be the most likely source of such a document.

35. Rather than demonstrating an ulterior motive on the part of the Director his action seeking to expedite the issue of a travel document is entirely consistent process that the Director was undeniably entitled to follow, with Mr Hashimi having entered Hong Kong unlawfully on a false passport, and having committed a serious offence.

36. The fact that the power to detain Mr Hashimi was about to expire prior to the making of the removal order is entirely beside the point. It may well be that the Director was dilatory in not reaching a conclusion prior to that time, and that with the impending time-limit was forced to reach a conclusion. But there is nothing in the evidence to suggest that the relevant factors were not properly considered. The fact that the relevant factors were considered and a decision made at the last minute is a mere coincidence, and does not establish an ulterior motive on the part of the Director.

37. I accordingly reject the Ulterior Motive Argument.

Conclusion:

38. The application for judicial review is accordingly dismissed, and the proceedings are concluded.

Costs:

39. If the Director wishes to seek costs he may do so by written submissions to be filed within 14 days, Mr Hashimi's counsel to respond in 14 days, the Director to reply 7 days thereafter.

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

Mr Wilson K S Chan, instructed by Messrs Ho, Tse, Wai & Partners, for the Applicant

Mr Abraham Chan, instructed by the Department of Justice, for the Respondent