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HCAL 60/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 60 OF 2005

BETWEEN

V Applicant

and

DIRECTOR OF IMMIGRATION Respondent

Before : Hon Chu J in Court

Date of Hearing : 24 & 25 October 2005

Date of Judgment : 25 November 2005

JUDGEMENT

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1. By this application, the applicant seeks to challenge the decision of the Director of Immigration ("the Director") to place the applicant on recognizance under section 36 of the Immigration Ordinance ("the Ordinance") on the basis of a detention order made under section 32(2A) of the Ordinance, and subject to the terms and conditions stated in his letter dated 20 October 2004.

THE FACTS

2. The full background leading to the Director's decision and the present proceedings had been set out in the Form 86A and summarized in the Chronology prepared by Mr Dykes SC for the hearing. For the purpose of the present application, the facts that are directly relevant appear below.

3. The applicant arrived in Hong Kong in December 2000 and was given permission to stay as a visitor.

4. While in Hong Kong, he applied to the UNHCR for recognition of refugee status, which was rejected in 2003. He had also made a claim to the Director of fear of torture in his country of origin. The Director did not investigate the claim until after the refugee claim was rejected by the UNHCR.

5. In October 2002, the applicant's application for further extension of stay was refused. Notwithstanding the expiration of the permission of stay, he has remained in Hong Kong. Initially, he was placed on recognizance by the Director.

6. In March 2003, the Director issued a removal order against the applicant, and he was detained shortly afterwards. The applicant's appeal to the Immigration Appeal Tribunal was dismissed without a hearing. At the same time, UNHCR rejected the applicant's application for refugee status.

7. Shortly thereafter, Amnesty International wrote to the Director in respect of the applicant's torture claim. The Director confirmed he would look into the applicant's allegations. Eventually in January 2004, the Director commenced CAT screening interviews with the applicant.

8. On 30 March 2004, the applicant commenced judicial review proceedings under HCAL 45/2004 to challenge the removal order, drawing assistance from the Court of Appeal's decision in *Sakthevel Prabakar v. Secretary for Securit*y CACV 211/2002. Leave to judicial review was granted.

9. The applicant also made an application for bail in the proceedings. The Director opposed the application on the ground of public security. After a contested hearing that involved a Special Advocate, Hartmann J granted bail to the applicant that included the following conditions:

(1) The applicant was to provide the Court with an identifiable address where he shall reside after release; and

(2) The applicant shall stay on Hong Kong Island and not leave Hong Kong Island.

10. On 28 September 2004, the Director rescinded the removal order. On the same day, the Director issued an authorization for detention in respect of the applicant. As indicated by the Department of Justice's letter dated 30 September 2004, the detention order was made under section 32(2A) of the Ordinance, pending a decision as to whether to make a removal order under section 19(1)(b) of the Ordinance.

11. There were then discussions between the applicant's legal representatives and the Department of Justice for the Director on the further conduct of HCAL 45/2004. While the Director proposed to adjourn the judicial review application *sine dine*, the applicant was of the view that the application should be discontinued with costs to him. Eventually on 19 October 2004, Hartmann J ordered by consent the discontinuance of the judicial review application with costs against the Director.

12. At about the same time, the Director proposed to grant the applicant recognizance on the same terms and conditions as the court bail. The applicant, having requested for permission to remain in Hong Kong pending the determination of his torture claim, agreed, under protest, to enter into recognizance with conditions similar to those previously ordered by Hartmann J.

13. On 23 October 2004, the Director granted recognizance to the applicant under sections 32 and 36 of the Ordinance that included the following conditions:

(1) Not to leave Hong Kong Island; and

(2) To reside at the address stated on the Recognizance Form.

14. By letter dated 5 November 2004, the Director indicated, *inter alia*, that he had decided to extend the period of consideration on whether to make a removal order, with the applicant remained to be on the recognizance granted on 23 October 2004.

15. In March 2005, the Director resumed CAT screening interviews with the applicant.

16. The investigation into the applicant's torture claim is still ongoing. The Director is therefore not in a position to come to a decision as to whether to issue a removal order against the applicant.

THE JUDICIAL REVIEW APPLICATION

17. On 16 June 2005, the applicant commenced the present proceedings, after legal aid was granted to him. On 20 June 2005, Hartmann J granted leave to apply for judicial review and ordered an expedited hearing.

18. The applicant's challenge is twofold. Firstly, he challenges the lawfulness of the Director's decision to put him on recognizance on the basis that he was liable to be detained under section 32 of the Ordinance. Secondly, he disputes the Director's power to impose geographical limitation as a condition of the recognizance, being a condition not provided for in the statutory form (Form 8) that is prescribed by section 36 of the Ordinance.

SECTIONS 19(1), 32(2A) & 36 OF THE IMMIGRATION ORDINANCE

19. For the present application, it is important to note the provisions in sections 19(1), 32(2A) and 36 of the Ordinance.

20. Under section 19(1)(b), the Director may make a removal order against a person requiring him to leave Hong Kong if it appears to him that that person:

(1) might have been removed from Hong Kong under section 18(1) if the time limited by section 18(2) had not passed;

(2) has landed in Hong Kong unlawfully or is contravening or has contravened a condition of stay in respect of him;

(3) not being a person who enjoys the right of abode in Hong Kong, or has the right to land in Hong Kong by virtue of section 2AAA, has contravened section 42; or

(4) being a person who by virtue of section 7(2) may not remain in Hong Kong without the permission of an immigration officer or immigration assistant, has remained in Hong Kong without such permission.

21. Section 32(2A) provides that a person may be detained pending the decision of the Director or his subordinates as to whether or not a removal order should be made under section 19(1)(b) in respect of that person for:

(a) not more than 7 days under the authority of the Director or his subordinates;

(b) not more than a further 21 days under the authority of the Secretary for Security; and

(c) where inquiries for the purpose of such decision have not been completed, for a further period of 21 days under the authority of the Secretary for Security, in addition to the periods provided under (a) and (b).

22. Under section 36(1), it is provided that:

> "An immigration officer or a police officer may require a person –
> (a) who is detained under section 27, 32 or 34; or
> (b) who, being liable to be detained under any of those sections, is not for the time being so detained,
> to enter into a recognizance in the prescribed form in such amount and with such number of sureties as the Director or such police officer may reasonably require; and where a person who is so detained enters into such a recognizance he may be released."

THE RECOGNIZANCE DECISION

23. In respect of the first decision to put the applicant on recognizance, the applicant's Form 86A raises three grounds of challenge. Firstly, it is said that the recognizance was unlawful having regard to the maximum period of detention under section 32(2A) of the Ordinance. Secondly, it is said that the recognizance can only be in place for a reasonable period of time, which has since expired. Thirdly, it is said that the continuation of the recognizance is unreasonable. At the hearing, only the third ground was not pursued.

Ground 1:Maximum period of detention under section 32(2A)

24. The applicant's first ground is premised upon section 32(2A) of the Ordinance. Under the section, a person may be detained up to a maximum period of 49 days, pending the decision as to whether or not a removal order should be made against him under section 19(1) of the Ordinance.

25. The applicant's case is that the Director or his subordinates are required by the section to make a decision whether to issue a removal order within the 49 days period. It is argued that, given the power to require recognizance under section 36 can only be exercised against a person who is or is liable to be detained under, *inter alia*, section 32, the 49 days time limit should carry over to the power to require recognizance as a matter of necessary statutory implication. It follows that the recognizance exacted from the applicant can only endure for the 49 days maximum period, which has long expired.

26. It is clear from a reading of section 32 that the section is dealing with the detention of a person pending removal or deportation. Sub-section (1A) specifically empowers the detention of a person pending consideration on whether to make a removal order. The focus of subsection (2A) is on the permissible length of detention pending the decision on whether to make a removal order. Plainly, it is to regulate and restrict the period of actual physical detention.

27. There is, however, nothing on the face of section 32(2A) to restrict the Director's power to issue removal orders to the 49 days period. The section cannot be read as imposing on the Director a time limit for deciding whether to issue a removal order. The Director's power to make removal orders is provided for in section 19(1) and it may be exercised notwithstanding the expiration of the maximum period of detention permitted under section 32(2A).

28. What follows as a matter of necessary implication is that the Director can only have a person detained for up to 49 days while he

deliberates on whether to make a removal order. At the end of that period, the person must be released even if the Director's deliberation has not completed. The Director will then have to release the person unconditionally or put him on recognizance while his deliberation continues.

29. It also follows that if the Director considers that it is unlikely to reach a decision within the 49 days period, it will be appropriate for him to place the person under recognizance under section 36 instead of physically detaining him under section 32.

30. In my view, there is no absurdity in affording the Director more time to make a decision on removal in a case where the person is released or put on recognizance.

31. In the present case, it is common ground that the applicant's torture claim will require more than 49 days to investigate and determine, particularly when the Director is under a duty to take into account the human rights situation in the country concerned: *Secretary for Security v. Sakthevel Prabaker* (2004) 7 HKCFAR 187 at 197, para.10. It must therefore be fundamental to the proper discharge of the Director's duty to act cautiously and not to remove a person to a place where a risk of torture is said to exist, that he should be able to take as along as is necessary for the investigation of the claim. There is thus nothing objectionable for the Director's power to place the applicant on recognizance, not to be subject to time limit. Quite the contrary, it is conducive to the proper exercise of the Director's power and duty.

32. The applicant refers to the provisions in Part IIIA, noticeably section 13D, of the Ordinance that apply to Vietnamese refugees and points put that it is possible for the government to tackle the problem posed by persons like the applicant by a similar legislative enactment providing for open-ended detention. Like section 32, section 13D deals with the detention of a Vietnamese migrant pending the Director's decision on whether to grant him permission to remain in Hong Kong and if permission is refused, pending his removal. It however differs from section 32 in that there is no restriction on the period of detention. Thus a Vietnamese migrant may be detained for as long as is necessary to reach a decision on whether to grant him permission to remain in Hong Kong or to effect his removal.

33. As submitted by both counsel, Part IIIA was a legislative response to an acute problem faced by the government in the early 1980s, caused by influx of large number of Vietnamese boat people. In permitting open-ended detention, section 13D has the effect of doing away with the need to consider granting recognizance to these Vietnamese migrants.

34. In my view, the reference to section 13D does not advance the applicant's argument that the power to grant recognizance under section 36 is subject to the maximum period of detention under section 32(2A). To suggest that the government should have moved to legislate to give the Director power to detain a person indefinitely pending investigation of his torture claim is simply not an attractive argument.

Ground 2: Reasonable duration of the recognizance

35. On the second ground, the applicant's case as appears from the Form 86A is that the Director's power under section 36 must be exercised for the purpose specified in the section and can only endure a limited period. The applicant says that this is so in view of the fact that the recognizance is a severe constraint on his liberty such that it should be allowed to last for a short period only.

36. In advancing this ground, the applicant has placed reliance on the principles stated in *R v. Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704. In that case, Woolf J held that although a power to detain is not subject to express limitation of time, it is subject to two limitations, namely, it can only be used for the specified purpose, and it is impliedly limited to a period that is reasonably necessary for that purpose. These principles were applied by the Privy Council in *Tan Te Lam & Ors v. Superintendent of Tai A Chau Detention Centre* [1997] 6 HKPLR 13, an appeal from Hong Kong.

37. The *Hardial Singh and Tan Te Lam* cases and the principles involved were recently considered by the House of Lords in *R (on the application of Khadir) v. Secretary of State for the Home Department* [2005] 3 WLR 1. The House of Lords pointed out (at para.25) that the court in those cases was only concerned with whether the applicants were still lawfully detained, and did not consider the consequences of their release from detention. The House of Lords (at paras.31-33) was of the view that a distinction should be drawn between the circumstances in which a person is potentially liable to detention and the circumstances in

which the power to detain can in any particular case properly be exercised. It concluded that the principles in the *Hardial Singh* case had no application to a person who is liable to be detained but is not actually detained.

38. On the basis of the *Khadir* case, Mr Marshall SC for the respondent says that the second ground must fail.

39. In response, Mr Dykes SC argues that the present case differs from the *Khadir* case in that the purpose of detention under section 32(2A) is to enable a decision be made, and that the power to detain for the purpose has a time limit of 49 days. In Mr Dykes SC's submissions, the applicant is not a person liable or even potentially liable to be detained under section 32 and he therefore does not come within section 36. It is said that the Director, as a prudent decision-maker, will not make a decision about removal until he has in his possession all the relevant facts for determining the applicant's torture claim, including the human rights condition in his country of origin. In the present case, the Director obviously could not have been able to make the decision within the 49 days maximum period for detention. He therefore could not have detained the applicant and it would be wrong to use the power of detention given by section 32. Thus back in October 2004 when the Director placed the applicant on recognizance, the applicant was not a person who was being liable to be detained under section 32.

40. The truth of the matter is the applicant has since October 2003 been an overstayer. He was to be removed under section 19(1)(b), but was not removed because of his torture claim. Under section 32(1A) and (2A),

he may be detained pending the decision as to whether a removal order should be made. The Director had further on 28 September 2004 ordered that he be detained under section 32(2A) pending the decision on whether a removal order should be made. Thus viewed, the applicant must be a person liable to be detained when he was put on recognizance on 23 October 2004. The power under section 36 was therefore properly engaged.

41. As analysed above, section 32(2A) does not have the effect of requiring the Director to reach a decision within 49 days as to whether a removal order should be made. There is no time limit governing the achievement of the purpose for the power to detain. There is no impediment to the applicant being a person liable to be detained despite the 49 days maximum period for detention.

42. For these reasons, the applicant's challenge to the lawfulness of the decision to require him to enter into recognizance fails.

DECISION TO IMPOSE CONDITIONS

43. In respect of the decision to impose conditions that are not provided for in Form 8, the prescribed statutory form, two issues are involved. They are:

(1) Whether the Director could lawfully impose conditions that are not provided for in Form 8 ("extra conditions") in the recognizance; and

(2) If not, whether the inclusion of the extra conditions renders the recognizance void or whether the extra conditions were

merely of no effect, without affecting the validity of the recognizance.

Power to impose extra conditions

44. In respect of the first issue, the applicant's case is that under section 36, the Director has no power to insist on the inclusion in the recognizance of extra conditions of residential requirement and geographical limitation.

45. The Director's argument is that the inclusion of the extra conditions is reasonable and necessary on the facts of this case having regard to the perceived risks the applicant poses. It is further said that the legislature must have intended that the power to require recognizance, which ameliorates the power to detain, to include the power to impose reasonable and necessary conditions for meeting security risks. It is said that to construe otherwise will render the recognizance power ineffective and will force the Director to fall back on detention.

46. On a plain reading of section 36(1), the Director can only require a person "to enter into a recognizance in the prescribed form in such amount and with such number of sureties as the Director … may reasonably require" and that upon entering into "such a recognizance he may be released". The prescribed statutory form (Form 8) only deals with the amount and number of sureties and reporting requirements. No other conditions are provided for.

47. By contrast, Form 11, which is the prescribed form for recognizance upon the rescission of a deportation order under section 55(2),

has made provisions for other conditions to be attached. The applicant argues, and I agree, that the legislature had intended a difference between recognizance under section 36 and that under section 55.

48. The legislature intent can further be gauged by noting the provision on recognizance in the 1949 Immigrants Control Ordinance, which pre-dated the Ordinance. Under section 14 of the 1949 Ordinance, an immigration officer my release a person detained upon his entering into a recognizance, with or without sureties, for a reasonable amount. The section expressly allows extra conditions be attached by providing that: "The liberty granted after recognizance shall be subject to such conditions of residence and report as the Immigration Officer thinks fit."

49. Mr Marshall SC however argues that the omission from section 36 of the power to impose other conditions such as those provided for in section 14 of the 1949 Ordinance is to achieve an alignment with section 37 of Interpretation and General Clauses Ordinance, cap.1, which provides that deviations from a form prescribed by or under any Ordinance shall not affect the substance of such form nor invalidate it.

50. Mr Dykes SC submits that it is a curious way to achieve alignment with cap.1, especially when dealing with an important subject of personal liberty. I agree. There is also, in my view, no reason why the power of imposing extra conditions that the Director or his officer regards as reasonable and necessary cannot be expressly provided for in Form 8, just as it has been provided for in Form 11, if it were the legislature's intention to include such power in section 36.

51. In Mr Dykes SC's submission, there is a good reason for the difference in Form 8 and Form 11. It is said that unlike a recognizance under section 36, the recognizance under section 55 is not intended as an alternative for detention and is therefore not to ensure the availability of the person when a removal order is made or when he is to be removed. The section 55 recognizance is to be used when the Chief Executive rescinds a deportation order and it serves to secure some guarantee of future conduct of the person. The conditions attached to the recognizance have legal consequences as provided under section 55(3). I accept there is considerable force in this analysis.

52. The importance of section 55 and Form 11 lies in the fact that they demonstrate that it is open to the legislature to give express power to impose additional conditions. There is thus no basis for contending that the legislature must have intended the Director or his officer to have the general power to impose conditions to meet the statutory objective or to meet security needs. The argument on alignment with cap. 1 also falls away.

53. Mr Marshall SC also submits that Form 8, as with other precedent forms, is not a strait jacket and that legislature intended it to be adapted to include reasonable and necessary conditions. This submission ignores the fact that Form 8 is not a precedent form, but is a prescribed form. Furthermore, section 36 mandates the recognizance to be in the prescribed form.

54. Mr Marshall SC further makes reference to the common law position on detention and bail and recognizance as well as the immigration

problems underlying the Ordinance. I do not consider these relevant or as shedding light on the legislative intent with regard to the power under section 36. Among other things, the Director has no common law power in relation to detection of crime or protection of lives and properties. The submission that the legislature could not have intended to remove the common law power of the Director is misplaced.

55. In my view, the wordings of section 36 are clear. It does not give the Director or an immigration officer a general power to impose specific conditions. The prescribed form also does not allow for extra conditions to be included. It is therefore not open to the Director or his officer to include other conditions he considers to be useful or necessary for the exercise of his power: see *R (on the application of CPS) v. Chorley JJ* (2002) EWHC 2162. This is unlike the position in the UK where the Immigration Act 1971 empowers the immigration adjudicator and immigration officer to impose conditions or restrictions on persons for achieving the statutory purpose: see Immigration Act 1971, Schedule 2, paras.21 and 22.

The consequences of the extra conditions

56. The question that follows from my conclusion that there is no power under section 36 to impose conditions not provided for in the prescribed form is: whether this will invalidate the Director's decision to put the applicant on recognizance pending a decision as to whether to make a removal order.

57. In the first place, I do not regard this as a situation involving a mere deviation from the prescribed form. The Director or his officer had imposed extra conditions as to requirement of residence and geographical limitation on his movements, which he was not authorized by the statue to do. The applicant's challenge goes not to the use of the statutory form, but to the exercise of the statutory power. It is therefore irrelevant that the applicant had "accepted" the recognizance with the extra conditions. It is not a matter of procedure or procedural right that can be waived. After all, the applicant was required by the Director to be subject to the recognizance.

58. That said, however, I consider that a distinction should be drawn between the decision to require the applicant to be put on recognizance and the implementation of the decision, fine though the line may appear to be. While the Director or his officer has no power to include extra conditions in the recognizance, it is within his power to put the applicant on recognizance as an alternative to actual detention. The extra conditions attached to the recognizance are clearly void and of no effect, but that should not invalidate the recognizance that the applicant had entered into.

Conclusion

59. For the above reasons, I am minded to allow the judicial review limited to the extent of declaring the extra conditions relating to residential requirement and geographical limitation on movements as being of no legal effect.

60. The Director had given notice that he might seek a stay pending appeal if the judicial review is determined in favour of the applicant. As agreed by counsel, I will defer the making of any formal order until after hearing counsel's further submissions, which will follow immediately after the handing down of this Judgment.

(C Chu)
Judge of Court of First Instance
High Court

Mr Philip Dykes SC instructed by Messrs Barnes & Daly for the applicant.

Mr William Marshall SC instructed by Department of Justice for the respondent.