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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
Dates of Hearing: 8, 18 April, 7, 8 August and 9 October 2008
Date of Judgment: 15 October 2008

J U D G M E N T

The application:

1. In November 2007, Mr Hashimi, acting on his own, without the assistance of solicitors, sought by judicial review proceedings, *certiorari* quashing a decision of the Director of Immigration that he should be detained pending his removal from Hong Kong. Mr Hashimi

also sought a writ of *habeas corpus*, to achieve his release from immigration detention, pursuant to s 32(3A), Immigration Ordinance, (the Ordinance).

2. Following the grant of leave, Mr Hashimi was granted legal aid, and solicitors and counsel were instructed. They elected to proceed on the basis of Mr Hashimi's home-made papers.

The course of the proceedings:

3. The proceedings first came before me on 8 April 2008, when the central issue was whether or not Mr Hashimi's continued detention was in breach of what have become known as the *Hardial Singh* principles, (See *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704). If the detention offended those principles, *certiorari* would be likely to issue. Following argument from counsel the decision was reserved.

4. On 10 April 2008, whilst in the course of preparing the reasons for judgment, I received a handwritten 5 page "Notice of Motion", with an 14 page annexure, from Mr Hashimi requesting that the consideration of the reserved judgement should not proceed without a further oral hearing. The essence of Mr Hashimi's concern was a complaint that he had had insufficient time to consider the submissions to be delivered by counsel, and to give proper instructions to counsel. Consequently, notwithstanding the competent manner in which Mr Chan had dealt with matters, Mr Hashimi sought to address the court himself.

5. I reconvened the court on 18 April 2008, and heard from

counsel. Initially Mr Chan applied for leave to enable Mr Hashimi to address me directly. Mr Man opposed both the reopening of the issues, and Mr Hashimi addressing the court, when he was represented by counsel. After taking further advice Mr Hashimi instructed Mr Chan to seek leave to make further submissions on his behalf, and leave was sought to file further evidence.

6. As the issue raised was one of the liberty of a person, and a writ of *habeas corpus* had been sought, I gave directions for a further affidavit to be filed by Mr Hashimi, with liberty to the Director to reply if he wished. I gave directions for skeleton arguments to be exchanged and filed.

7. Before the matter could be set down for hearing again, the Court of Appeal intervened, on 18 July 2008, with the delivery of the decision in *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752. That judgment dealt directly with the power to detain conferred by s 32 of the Ordinance, in that case holding that the exercise of power by the Director was unlawful as being contrary to Article 5 of the Hong Kong Bill of Rights, (BoR), because no policy as to the manner in which the power of detention existed or had been made accessible to persons affected by the exercise of the power.

8. In the light of that decision, at the request of the parties, a further directions hearings was held on 7 August 2008, when Mr Chan sought to amend the Form 86A, to accommodate an argument that the detention of Mr Hashimi since 13 February 2007, was and had been unlawful as being in contravention of Article 5 BoR. Thus the issue in *A*

(Torture Claimant) was directly raised in the proceedings. I gave leave for the amendment subject to an adjournment to enable Mr Man to file an appropriate affidavit.

9. Mr Man informed me that the Director had now published an appropriate and accessible policy, but he was unable, at that hearing, to produce that policy to the court. Mr Chan was concerned that unless the policy was promptly given to the court it would be tailor-made to the applicant. Upon my direction the proceedings were adjourned to the next day, 8 August 2008, when the details of the policy were supplied by Mr Man. Directions were then given on the filing of affidavits.

10. Appropriate affidavits were filed, and the matter resumed on 9 October 2008, with the argument confined to the issue whether or not the detention of Mr Hashimi was lawful in terms of the decision in *A (Torture Claimant)*.

11. It will only be that, if his detention is lawful in terms of the decision in *A (Torture Claimant)*, the issue of whether or not Mr Hashimi's continued detention is in breach of the *Hardial Singh* principles will arise. That issue remains outstanding to be determined, depending on the result of this judgment. It is agreed by the parties that if the issue is to be determined further affidavits and the argument will be required. The final conclusion of the judicial review proceedings consequently remains open.

Factual scenario:

12. On 19 October 2000, Mr Hashimi arrived in Hong Kong from

Thailand. He presented to the immigration officer at the border control a Bangladeshi passport, issued on 2 December 1999, representing him as a Bangladeshi citizen. Mr Hashimi was permitted to enter and to remain in Hong Kong until 2 November 2000.

13. On 28 October 2000, Mr Hashimi gave packets of drug-laced juice to some tourists causing them to fall unconscious. On 29 October 2000, Mr Hashimi was arrested by the police in relation to those acts. He was ultimately charged with three counts of administering a stupefying or overpowering drug with intent to commit indictable offences, and three counts of theft. Pending his trial he was remanded in custody.

14. On 5 October 2001, whilst on remand prior to his trial, Mr Hashimi punched a Correctional Services Department officer.

15. On 9 November 2001, Mr Hashimi was convicted, following trial, on the 6 criminal counts he faced. He was sentenced to 8 years imprisonment. On 16 January 2002, Mr Hashimi was convicted of assault occasioning actual bodily harm in relation to the assault on the CSD officer. On 23 January 2002, he was sentenced to nine months imprisonment for that assault, with six months of that sentence to run consecutively to the 8 year term.

The steps towards removal:

16. With that background scenario it will come as no surprise that on 6 May 2002, the Director of Immigration caused to be served on Mr Hashimi a "Notice of Consideration of Deportation". The notice

informed Mr Hashimi that consideration was being given to recommending his deportation to Bangladesh. Mr Hashimi refused to sign the notice, the signature being requested merely to acknowledge receipt of the documents. There is nothing in the evidence to indicate that at the same time, Mr Hashimi was then informed in any way of any policy adopted by the Director in determining whether or not he should make a detention order should a removal order be made consequent upon a decision to deport Mr Hashimi.

17. In order to consider the lawfulness of Mr Hashimi's detention in terms of the decision in *A (Torture Claimant)* it is not necessary to examine in detail the events that transpired between 6 May 2002, and his subsequent detention for removal. Those facts may subsequently be relevant to any consideration of *Hardial Singh* principles to the circumstances of Mr Hashimi's detention.

18. It is sufficient to say that Mr Hashimi completed his prison sentence on 20 December 2006, upon which day he was given formal notice that he was then detained pursuant to s 32(2A)(a) of the Ordinance, which permits detention for not more than seven days pending the decision of the Director of Immigration as to whether or not a removal order should be made under s 19(1)(b) of the Ordinance. That provision essentially enables the removal of persons who, for a number of different reasons, such as being subject to a deportation order or having landed unlawfully, have no right to remain in Hong Kong.

19. That detention expired on 3 January 2007, on which day Mr Hashimi was then detained pursuant to s 32(2A)(b) of the Ordinance,

which permits a further 21 day detention, to 24 January 2007, under the authority of the Secretary for Security.

20. On 13 January 2007, Mr Hashimi made a written request for release from detention on recognizance. On 15 January 2007, Mr Hashimi lodged a claim under the Convention Against Torture, (CAT) with the Director of Immigration.

21. On 23 January 2007, Mr Hashimi's detention for a further 21 day period, to 13 February 2007, was authorised by the Secretary for Security pursuant to s 32(2A)(c) of the Ordinance. On 30 January 2007 Mr Hashimi made a further written request for release from detention on recognizance.

22. On 13 February 2007, a removal order was made in respect of Mr Hashimi under s 19(1)(b) of the Ordinance 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.

The effect of the decision in A (Torture Claimant)

23. The following propositions, relevant to these proceedings, are established in *A (Torture Claimant)*:

(1) The power to detain under s 32 is lawful under the domestic law of Hong Kong. The provision conferred a power to detain pending removal from Hong Kong under s 25. So long as the Secretary of Security was intent upon removing the person at the earliest possible moment and it was not apparent to him that the removal within a reasonable time would be impossible, the power to detain pending removal was in principle still exercisable;

(2) However, the power of detention under s 32 was contrary to Article 5(1) of the Hong Kong Bill of Rights and so unlawful. The grounds and procedure for detention were not sufficiently certain and accessible, as required by Article 5;

(3) In the absence of published policies as to the circumstances under which the s 32 power to detain would be exercised, Article 5(1) was infringed;

(4) A clear and lawful policy, which did not exist, would ensure that the Director of Immigration, when deciding whether or not to detain, would have considered all relevant circumstances and the decision would not be arbitrary;

(5) The availability of such grounds would also enable an applicant to know how best to ensure that he was not detained.

The steps taken by the Director following A (Torture Claimant):

24. Following the delivery of the decision in *A (Torture Claimant)*, the Director took steps to meet the requirements of that decision. Those steps were set out in the affidavit of Mr Tam Yun Keung, an Acting Assistant Principal Immigration Officer. In order to make the policy accessible, certain notices, purporting to set out the policy, were placed at noticeable locations inside the various detention centres. The affidavit described notices in the following terms:

> "(a) A notice entitled "Notice on Detention Authority" to inform detainees of: (i) the relevant provisions of section 32 of the Immigration Ordinance (Cap 115) ("the Ordinance") under which person may be detained; (ii) of the detention period; (iii) the authority of detention[1]; and (iv) the purpose of detention.
>
> (b) A notice entitled "Notice on Request for Release on Reognizance" to inform detainees that a person detained under section 32 of the Ordinance may request to be released on recognizance in lieu of detention, and to inform them of the main criteria which the Director will take into account in determining whether to release person on cognizance."

25. Mr Tam went on to say:

> "…at the same time (as those notices were posted the Director reviewed) all detention cases, informing the detainees of the reasons for the detention and reasons for refusal to release where detention is maintained after review. In this connection, the Director has devised a notice/form to complement such exercise."

26. As with each other detainee, Mr Hashimi's case was reviewed. Following the review he was given two documents, the first entitled

[1] I understand this to be a reference to the official in Government authorised to make the detention order in the particular circumstances.

"Detailed Ground(s) for Detention", and the second entitled "Review of Detention". These were exhibited to Mr Tam's affidavit. The relevant portion of those documents is as follows:

> "Detailed Ground(s) for Detention
>
> You are detained under the following section of the Immigration Ordinance (Cap 115). Detailed ground(s) for your detention are stated as below.
>
> S 32(3A).
>
> The detainee's CAT claim was refused
>
> The detainee may abscond and/or commit (re)offending. The detainee was arrested by the Police and convicted of serious criminal offences.
>
> Others: the detainee's identity is still in doubt."

> "Review of Detention
>
> Result of Review of Detention
>
> We have conducted review of your detention. The result of the review is stated as below.
>
> With respect to the prevailing policy, the Director of Immigration has conducted a review of detention in your case. Having carefully considered all the relevant circumstances of your case, the Director of Immigration decides on 30-07-2008 that:
>
> Release on recognizance is not granted on the following reasons:
>
> The detainee's removal is going to be possible within a reasonable time. The detainee's CAT claim was refused.
>
> The detainee may abscond and/or commit (re)offending. The detainee was arrested by the Police and convicted of serious criminal offences.
>
> Others: The detainee's identity is still in doubt.
>
> Should there be any material change in circumstances of your case, we are prepared to consider the matter again."

27. The case advanced by Mr Man was that these steps appropriately remedied the defaults in the procedure identified by the Court of Appeal in *A (Torture Claimant)*. Mr Chan contended, as will be seen in the next section, that any errors in the procedure adopted by the Director when he originally detained Mr Hashimi could not be remedied.

May an originally unlawful detention be subsequently remedied:

28. It is arguable that, in terms of the decision in *A (Torture Claimant)*, Mr Hashimi's original detention, following the completion of his prison sentence, was unlawful. The first argument advanced by Mr Chan was that as Mr Hashimi was originally unlawfully detained he was entitled to release and that the subsequent steps taken by the Director could not remedy the situation.

29. In this respect it must be remembered that the relief sought by Mr Hashimi, in respect of his detention, is that of *habeas corpus*. The correct position is set out in the judgment of the Mortimer VP in *Director of Immigration v Long Quoc Tuong* [1998] 1 HKC 290 at 299, where the learned Vice-President cites two passages from R J Sharpe on the *Law of Habeas Corpus*, (2nd Ed) at p 179, from which it is quite clear:

(a) that the authorities may amend and correct informalities which are relied on as grounds for an application for habeas corpus, and

(b) that a substituted warrant which corrects defects in a first committal will always be allowed.

30. I am accordingly satisfied that the Director was perfectly

entitled, following the decision in *A (Torture Claimant)*, to take steps to remedy any defects that might be perceived in the detention of Mr Hashimi. Consequently, if those steps are lawfully effective, then any originally unlawful detention will be irrelevant. In simple terms, on an application for *habeas corpus* the court is concerned with the lawfulness of an applicant's *current* detention, and not what might have happened in the past.

31. For completeness, I note that the decision in *Long Quoc Tuong* went to the Court of Final Appeal, sub nom *Thang Thieu Quyen & Ors v Director of Immigration & Anor* (1997-98) 1 HKCFAR 167, where, except to the extent that at p 197E Bokhary PJ indicated agreement with the view of Godfrey JA "that the courts are concerned with the power under which the early arrivals are '*currently* detained'", the issue did not arise.

Is the policy lawful:

32. In *A (Torture Claimant)* the Court of Appeal compared the Director's policy with the policy relied upon by the Home Office in *N (Kenya) v Secretary for State for Home Department* [2004] INLR 612. In that decision the English Court of Appeal concluded that the detention of the applicant was unlawful because the policy as to detention was not accessible in its entirety. No exception was taken to the policy itself. However the failure of the policy to state that, while the fact that the institution of proceedings challenging detention would result in release, and that an intimation by solicitors of a pending challenge was not sufficient to achieve release, was sufficient for the court to hold that the

whole of the policy was not accessible.

33. Comparing the policy of the Director with that of the Secretary for State, the Hong Kong Court of Appeal concluded that the Director's policy, as stated in the document upon which the Director relied, was incomplete.

34. The Director now relies upon the Notice on Detention Authority, and the Notice on Request for Release on Recognizance, together with the documents comprising his decisions, served on Mr Hashimi, as the documents upon which the complete policy, accessible to a person liable to be detained, is established.

35. The Notice on Detention Authority does not assist the Director. It merely states the section in the Ordinance upon which the Director will rely for the detention, the allowable period of detention, the individual within Government who may order the detention, and the purpose of detention, which, in each case in the document, (there are 9 alternative scenarios under s 32), merely repeats the purpose set out in the Ordinance.

36. It does not in any way comprise a statement of the policy by which the Director will exercise the various discretions he has under s 32.

37. The Notice on Request for Release on Recognizance is in the following terms:

> "Under section 36 of the Immigration Ordinance, Chapter 115, Laws of Hong Kong, a person detained under section 32 of the same Ordinance may request to be released on recognizance in lieu of detention. In determining whether to release a person on

> recognizance under section 36 (1) of the Immigration Ordinance, the Director will take into consideration all the relevant circumstances of the case, including inter alia, (i) whether that person concerned constitutes a security risk to the community: (ii) whether there is any risk of that person absconding and/or (re)offending; and (iii) whether removal is not going to be possible within a reasonable time. The request for release on recognizance will be considered on individual merits."

38. I am satisfied, for a number of reasons, that this document fails to properly establish a policy that is complete. To be complete, the policy must be such so as to meet the "requirement that the law should enable those affected by reasonably to foresee the consequences of their actions": see *Sunday Times v United Kingdom* [1979] 2 EHRR 245, and *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2002] 2 AC 19 at 38.

39. First, plainly, the Director cannot rely upon any documents served on Mr Hashimi recording his decision and reasons for that decision as documents constituting a policy, accessible to Mr Hashimi. The policy must be established prior to making a decision, and accessible prior to the making of the decision.

40. Second, on its terms, the matters set out in the documents, relied upon show that what policy there is, are at best, a policy directed only at considering an application for release on recognizance under s 36 of the Ordinance, and not a policy directed at considering whether or not a person should be detained pending removal. There is a plain distinction between the initial decision that must be made to detain a person, (under the various sub-sections of s 33), and any subsequent decision under a different provision, (e.g. under s 36), whether or not to continue detention, or to release upon recognizance.

41. Third, even if the documents constituted a policy directed at considering whether or not a person should be detained pending removal, it is a policy which does not admit to any basis upon which a potential detainee might not be immediately detained pending removal, but instead immediately released. The Director has a discretion whether or not to make a detention order. In exercising that discretion he must inevitably consider, at the outset, the prospect that the person may not be detained but may be released into the community.

42. In my view it is particularly significant that in *N (Kenya)*, the policy established by the Secretary of State contained the following statements:

> "1. There is a presumption in favour of temporary admission or temporary release.
>
> 2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.
>
> 3. All reasonable alternatives to detention must be considered before detention is authorised.
>
> …
>
> 6. The following factors must be taken into account when considering the need for initial or continued detention.
>
> For Detention
>
> (7 criteria)
>
> Against detention:
>
> - is the subject under 18?
> - has the subject a history of torture?
> - has the subject a history of physical or mental ill health?"

43. It is quite plain from this policy that the Secretary for State, when considering the initial question of detention, will also direct his mind to release generally or on recognizance. In fact he does so immediately, and with a presumption in favour of release from detention.

44. There is nothing in the purported policy of the Director that indicates any basis to those considering the issue upon which they may give any consideration to release. On the basis of the policy as established, a person considering the issue is given no guidance as to how he should approach that aspect of the decision, neither does a person facing detention know what matters should be raised to achieve immediate release. On the face of the policy the question of release will not be considered until such time as a person might make an application for release on recognizance.

45. The requirement of the decision in *A (Torture Claimant)*, is that the statement of the policy must be complete. In the absence of any indication as to any basis upon which immediate release on recognizance, or immediate release into the community upon the basis of an entitlement to stay until removal is effected, instead of detention, might be considered, I am satisfied that the documents relied upon by the Director cannot constitute a complete statement of policy.

46. Fourth, even if it were argued that the Notice on Request for Release on Recognizance was sufficient to constitute a policy in respect of the decision to detained upon the making of an Order for Removal, it is deficient for the reasons in paras 41-45 above, in failing to consider any basis upon which a person might be immediately released.

47. Finally, for the avoidance of doubt, I should record that I am of the view that there is nothing paragraph 17 of the Legislative Council Paper relied upon by the Director in *A (Torture Claimant)* which in any way advances the position of the Director in the establishment of a policy.

48. The error into which the Director appears to have fallen is to have slavishly followed paragraph 17 of the LegCo Paper in the documents posted, rather than carefully examining what might constitute an appropriate policy. It is unfortunate that more careful consideration was not apparently given to that policy by the Director. Having been given the advantage of knowing of the policy adopted by the Home Secretary in *N (Kenya)*, and albeit that that policy had been found deficient in one aspect, the Director would have been well advised to use that policy as an indication of what might be an appropriately complete policy. Had such consideration being given, it appears to me to be obvious that the question of immediate release, and grounds upon which release might be ordered, would have been included in the policy.

What constitutes a complete policy:

49. Mr Chan argued strongly that the use of the expression "including, *inter alia*", in the documents relied upon by the Director was fatal to the statement of policy because it meant that there were factors which the Director might take into account, but which were not made known to the subject. The use by Mr Tam of the expression "main criteria" in his affidavit, aggravates the situation, (see para 24(b) above).

50. While superficially attractive, I do not believe that there is any

merit in the argument. That said there are much better ways to express the position.

51. First, as Mr Man pointed out, item 5 of the policy of the Secretary for State in *N (Kenya)* provides:

> "There are no statutory criteria for detention, and each case must be considered on its individual merits."

This statement makes it plain that the Secretary will, in appropriate circumstances, weigh into the balance the individual merits of the case. Obviously, the individual merits of a case might well raise a factor which is not specified in the policy.

52. I accept the submission of Mr Man that the certainty criterion does not require the Director to exhaustively list every possible factor that he may take into account in coming to his decision. It is plain that the law must be sufficiently flexible, especially where it has to deal with a variety of different circumstances: see *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 at § 69, and *Shum Kwok Ser v HKSAR* [2002] 5 HKSAR at § 69. It would be quite wrong to impose upon the Director a requirement that denied flexibility in appropriate cases, and effectively shackled his hands in all future cases.

53. In this respect, what is important, is that when a detainee is informed of the reasons for his original detention, or, as in the present case, his continued detention, or for the refusal of release on recognizance, he must be informed of all of the grounds upon which the Director relies.

54. Mr Chan argued that the use of the word, “Others”, in the two documents given to Mr Hashimi meant that he did not know all of the reasons why he was detained. The argument is untenable. In both documents the Director has given as the “Other” reason, that Mr Hashimi’s identity is still in doubt. In any challenge to the reasonableness of the detention in judicial review, the Director would be confined to that reason. It would not be open to him to assert some additional “other” reason.

55. Accordingly, were I satisfied that a proper policy was established, and accessible, the use of the expression, “Others”, in the documents given to Mr Hashimi would not justify any interference with the decision of the Director.

56. There is a plain danger of uncertainty in the use of the expressions such as “including, *inter alia*” or “main reasons”, in a policy statement in circumstances such as these. Good guidance as to a satisfactory way in which unknown factors, or factors relevant only to a particular case, might be taken into account is seen in item 5 of the policy in *N (Kenya)*, (see para 51 above).

Is the policy accessible:

57. Having concluded that there is no proper policy, it is not strictly necessary for me to go to the issue of accessibility. In case the matter should go further I set out my views.

58. The issue of accessibility to the Director’s policy on detention pending removal raises different questions in relation to different factual

circumstances. The question of accessibility to the policy in relation to a person who arrives in Hong Kong, and is virtually immediately faced with the prospect of detention pending removal is not one which arises in these proceedings. That fact scenario raises difficult issues. For that reason anything I may say as to accessibility in the case of Mr Hashimi must be restricted to his particular factual circumstances.

59. The evidence of Mr Tam is that the documents comprising the policy were posted in the day rooms of the various detention centres. It is in those rooms that detainees spend the bulk of their days. The documents were in English and Chinese and 12 other languages, namely Bengali, Sinhalese, Tamil, Nepali, Punjabi, Urdu, Hindi, Somali, Thai, Tagalog, Vietnamese and French. In a further affidavit, Mr Tam has produced photographs showing the posted notices. They are plainly exposed to easy viewing.

60. It is no answer for an applicant to say that he did not see the notices, or that he did not read them. In simple terms they were perfectly accessible to anyone who chose to read them.

61. I am satisfied that the documents relied upon by the Director, although not containing a sufficiently certain policy, were appropriately accessible to Mr Hashimi.

When must the policy be accessible:

62. The issue of accessibility, and the authorities relied upon, raised a further difficulty in this case. This arises from the use of the

following expression in *Sunday Times*,

> "…. the law should enable those affected by it reasonably to foresee the consequences of their actions."

and *Evans*:

> "…. and that it must be sufficiently precise to enable the individual to foresee the consequences of the restriction…."

63. The implication that arises from those statements is that an person who may be affected by the policy must be able to be access the policy prior to any decision based upon the policy which may affect them, so that they may order their affairs in the light of the policy.

64. *Sunday Times* was a case dealing with circumstances in which the Attorney-General obtained an injunction restraining the publication of newspaper articles in relation to the drug thalidomide. The publication was potentially a contempt of court, and the issue was whether the principles in relation to such publications constituting a contempt were formulated with sufficient precision to enable the newspapers to foresee, to the appropriate degree, the consequences which publication might entail. The European Court of Human Rights held that the particular principle at issue, known as the "pressure principle", was formulated with sufficient provision.

65. *Evans* was a case dealing with the basis upon which a release date for a prisoner was computed. Had the prisoner had proper access to the policy by which release dates were computed she would have been able to challenge the decision made as to her release date prior to that date, and would have achieved release 59 days earlier.

66. *Sunday Times* was referred to in *Shum Kwok Sher*, a case dealing with the constitutionality of the offence of misconduct in public office. *Shum Kwok Sher* was referred to in *Mo Yuk Ping*, a case dealing with the constitutionality of the offence of conspiracy to defraud. In both of those cases the court found that the offences were sufficiently certain to enable a person, with appropriate advice if required, to foresee the consequences of their actions and to regulate their conduct accordingly.

67. It is plain that all of these cases relate to circumstances in which, well prior to any decision being made in respect of a person, that person had ample time in which to access the policy and foresee the consequences of his actions.

68. Mr Chan contended that in order for any policy to be lawful it must be accessible to Mr Hashimi before any decision to detain him was made in order that he may appropriately order his conduct so as to avoid detention.

69. It would be asking the impossible to require the Director to have the policy in relation to detention accessible to all persons coming into Hong Kong, so that they may be aware of the consequences of their actions and the risk that they may be the subject of a removal order and consequently be detained pending removal. To adopt the words of the Court of Appeal in *A (Torture Claimant)* at p 770, § 51:

> "What accessibility requires will depend on the circumstances and common sense must come into it."

70. In my view the requirement that accessibility must enable a

person to know the policy in order that he may regulate his conduct, must, in the context of this case, be a requirement that he must be informed of the policy prior to the decision for administrative detention, in order that he may know what matters to draw to the attention of the appropriate official, in order that that official may properly weigh in the balance all appropriate factors.

71. The length of time available to the potential detainee will vary depending upon the circumstances. It may be a very short period of time if that person is to be refused admittance to Hong Kong at the airport, and the authorities wish to detain him pending removal. That issue does not arise in these proceedings.

72. In this case the Director had notified Mr Hashimi on 6 May 2002, that he was considering making an order for deportation. It would have been a simple matter to inform Mr Hashimi, at the same time, that in the event of a deportation order being made, a removal order would be made, and that detention pending removal would then be considered. Bearing in mind that initial detention order was not made until 28 December 2006, four years and seven months later, and the removal order was not made until six weeks later, on 13 February 2007, there was more than sufficient time within which to make the policy setting out the basis upon which a detention order might be made accessible to Mr Hashimi.

73. Once a decision has been made to detain a person under s 32, he should then be informed of his right to apply for release upon recognizance under s 36, and of the policy to be applied on such an

application, in order that he may conduct himself so best as to achieve release from detention.

74. In this case the facts must be judged upon the basis of the subsequent steps taken by the Director.

75. As I understand the evidence, the notices purporting to contain the policy were posted on 18 July 2008. The notices by which the Director purported to make a fresh decision in respect of Mr Hashimi's detention under s 32(3A), although undated, are attached to a facsimile transmission leader page, sent by the Director to Mr Hashimi's solicitors on 1 August 2008. The leader page records that the documents were to be served upon Mr Hashimi. In the absence of evidence to the contrary I proceed on the basis that Mr Hashimi received those documents on or about 1 August 2008.

76. Had the documents met the requirements of a policy, (which they do not), I am of the view that sufficient time had elapsed to enable Mr Hashimi to inform that the Director of any relevant matters pursuant to the policy that Mr Hashimi wished the Director to take into account.

77. In those circumstances, were it necessary for me to rule on this aspect of accessibility, I would have held that the policy was accessible to Mr Hashimi.

Conclusion:

78. For the foregoing reasons I am satisfied that, by reason of the

absence of a sufficiently certain policy as to the circumstances under which the s 32 power to detain would be exercised by the Director of Immigration, Article 5(1) of the Hong Kong Bill of Rights has been infringed, and that consequently Mr Hashimi is currently unlawfully detained.

79. I will hear counsel now on the orders to be made consequent upon that declaration.

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

Mr Wilson K S Chan, instructed by S Y Fung, for the Applicant

Mr Bernard Man, instructed by the Department of Justice, for the Respondent