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HCAL 75/2015

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

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CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

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NO. 75 OF 2015

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BETWEEN

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MOHAMMAD ASLAM QURESHI

Applicant

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and

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DIRECTOR OF IMMIGRATION

Respondent

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Before: Deputy High Court Judge Kent Yee in Court

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Date of Hearing: 21 May 2015

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Date of Judgment: 27 May 2015

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JUDGMENT

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Introduction

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1. This is an application for the issue of a writ of *habeas corpus* by an originating summons filed herein on 20 May 2015 (“**the OS**”).

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2. The applicant’s solicitors first informed this court by way of letters together with an affidavit of Christopher John Lucas dated 18 May 2015 of the applicant’s intended application in the late afternoon of 18 May 2015. The applicant, an Indian national, was then detained pursuant to section 32(3A) of the Immigration Ordinance, Cap115 (“**IO**”) and had been informed that he would be deported pursuant to a removal order in that very evening with the flight of CX 697 booked for him. The applicant asked for an urgent hearing to deal with his *habeas corpus* application.

3. It was plain that the applicant could not be possibly brought up by a body order in time. This court immediately informed the putative respondent. The putative respondent agreed to postpone the execution of the removal order until 22 May 2015.

Evidence

4. Before the parties made submissions, I directed that the draft affirmation of Lo Po Ying (“**Lo’s Affirmation**”) sought to be adduced by the putative respondent be read to the applicant with the assistance of an interpreter and asked him to confirm the accuracy of the narrative of the factual background leading to his application.

5. The present position of Lo Po Ying is Acting Chief Immigration Officer of the Removal Assessment Section (“**RAS**”) of the Immigration Department of the HKSAR Government. In his helpful skeleton submissions, Mr Chan, for the putative respondent, indicated his intention to rely on the matters stated in the said affirmation.

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6. At the hearing, Mr Tibbo, for the applicant, informed this court of the agreement of the applicant to the contents of Lo's Affirmation. On the other hand, the applicant took the opportunity to affirm his affirmation dated 21 May 2015.

Events taking place during applicant's detention

7. I shall first give a brief summary of what has happened to the applicant since his arrival in Hong Kong based on the agreed account stated in Lo's Affirmation.

8. On 23 December 2014, the applicant arrived in Hong Kong and was refused permission to land. He was hence detained under section 32(1)(a) of the IO pending removal under section 18(1)(a) of the IO. On the very same day, the applicant lodged his non-refoulement claim with the Director of Immigration ("**the Director**") by way of his handwritten English letter.

9. On the following day, the applicant was transferred to Castle Peak Bay Immigration Centre ("**the Centre**"). There, during his detention, he was given documents relevant to his claim printed in both English and Hindi. Duty Lawyer Service ("**DLS**") also immediately provided assistance to the applicant in his claim.

10. The applicant was unable to file his Non-Refoulement Claim Form ("**NCF**") within time and Mr Chu, his lawyer assigned by DLS, wrote to the Director on 15 January 2015 for a 21-day extension of time on the ground that there were intervening holidays and because of the

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unavailability of the applicant to give instructions. The extension was granted till 4 February 2015.

11. In the meantime, on 20 January 2015, a review of the applicant's detention was undertaken and it was decided to further detain him under section 37ZK of the IO pending the final determination of his non-refoulement claim.

12. On 23 and 26 January 2015, two similar reviews were made and the decision to detain the applicant pending the resolution of his claim remained unchanged.

13. On 3 February 2015, DLS submitted the applicant's NCF to the Director. On 9 February 2015, the Director informed the applicant through DLS that a screening interview was fixed for him on 17 February 2015.

14. As a result, the applicant together with his DLS lawyer attended the screening interview on 17 February 2015 in the presence of a Hindi interpreter.

15. On 24 February 2015, a review of the applicant's detention was conducted. His detention was maintained.

16. The outcome was communicated to the applicant by way of a Notice dated 26 February 2015 served on him. The applicant signed on the said notice to acknowledge his understanding of its contents. There, the following two grounds were relied on to refuse the applicant release on recognizance:

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(1) His torture claim may be decided within a reasonable time in the foreseeable future.

(2) He does not have fixed abode or close connection (e.g. family or friends) in Hong Kong to make it likely that he will be easily located if released.

17. On 9 March 2015, a Notice of Decision was sent to the applicant through DLS whereby the applicant was informed of the rejection of his non-refoulement claim (“**the Notice of Decision**”).

18. On 19 March 2015, the applicant filed his Notice of Appeal/Petition with the Torture Claims Appeal Board (“**TCAB**”) /Non-refoulement Claims Petition Office (“**NCPO**”).

19. On 20 March 2015, a review of the applicant’s detention was undertaken and the detention was maintained.

20. On 26 March 2015, another Notice of Review of Detention was served on the applicant. The same two grounds were relied upon to justify his continued detention. Again, the applicant signed on the said notice.

21. On 30 March 2015, the Immigration Department made an application for the removal order. On the same day, the TCAB/NCPO directed that an oral hearing for the applicant’s appeal/petition be held on 30 April 2015.

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22. On 1 April 2015, another review of the applicant's detention was undertaken and the detention was maintained on the same grounds.

23. On 2 April 2015, the removal order was made against the applicant ("**the Removal Order**") pursuant to section 19(1) of the IO. A notice of the Removal Order and right of appeal was served on the applicant on 9 April 2015.

24. On the same day, the applicant signed on a declaration to declare that he did not intend to appeal against the Removal Order. Apparently, an interpreter signed on the declaration too.

25. On 9, 14 and 24 April 2015, further reviews were conducted and further detention of the applicant was deemed appropriate.

26. On 5 May 2015, a Notice of Review of Detention under section 37ZK of the IO in both English and Hindi was served on the applicant. On this occasion, as stated in the Notice, the applicant refused to sign.

27. On 8 May 2015, the current solicitors for the applicant Messrs. T.H. Koo & Associates ("**TH Koo**") claiming that the detention of the applicant was unlawful. They further demanded immediate release of the applicant lest they should make an application for a writ of *habeas corpus*.

28. On 11 May 2015, the Director reverted to TH Koo by way of a letter of the same date stating that the applicant was being detained under section 37ZK of the IO pending his non-refoulement claim. It was

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further stated that the progress of his claim would be monitored to see whether it might be decided within reasonable time in the foreseeable future. Regular reviews would be made too to cope with any material change of circumstances.

29. On 12 May 2015, TH Koo wrote to make clear their intention to apply for a writ of *habeas corpus* unless the applicant was released on or before 15 May 2015.

30. On the same day, TCAB/NCPO handed down its decision and dismissed the applicant's appeal/petition ("**the Decision**"). The Decision was written in the English language by Ms Betty Kwan, Chairperson of the TCAB/Adjudicator of the NCPO.

31. On the other hand, a review of the applicant's detention was conducted and it was decided that the applicant's detention should be continued pending the execution of the Removal Order pursuant to section 32(3A) of the IO. In the written memo of the IO, it was stated that the decision to further detain the applicant was based on the imminence of his removal from Hong Kong.

32. On 15 May 2015, an order for an air ticket for the applicant was made and it was intended that the applicant would be removed from Hong Kong at 2015 hours on 18 May 2015 pursuant to the Removal Order.

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Applicant's evidence on unlawfulness of his detention

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33. The applicant in his affirmation said that Mr Tibbo paid him a visit in the Centre on 6 May 2015 and Mr Tibbo advised him that it would take a considerable time for his appeal/petition to be decided and the continued detention would be unlawful.

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34. The applicant was further advised that he might bring a civil action to claim damages for unlawful detention against the Director with the assistance of the Legal Aid Department.

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35. He complained that his human rights under Articles 3 and 5 of the Hong Kong Bills of Right Ordinance were breached by reason of his detention since his arrival and the imposition of the Removal Order depriving him the legal right to commence legal actions including judicial review for appropriate relief.

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Relevant legal principles

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36. The legal principles in respect of an application for issue a writ of *habeas corpus* are not in dispute. Mr Chan helpfully set out the legal principles germane to this application in his skeleton submissions.

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37. The central question is whether the detention is unlawful. An unlawful detention is one that is made without proper lawful authority in the first place and remains unlawful throughout. On the other hand, an initially lawful detention can be turned into an unlawful detention if it falls foul with the principles enunciated in *R v Governor of Durham*

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Prison, ex p Hardial Singh [1984] 1 WLR 704, now commonly known as *the Hardial Singh principles*.

38. A convenient summary of the *Hardial Singh* principles was made by Dyson LJ (as Lord Dyson then was) in *R (I) v Secretary of State for the Home Department* [2003] 1NLR 196 at §46 and adopted by Ribeiro PJ in *Ghulam Rbani v Secretary for Justice for and on behalf of the Director of Immigration* (2014) 17 HKCFAR 138 at §23. It is as follows:

(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

(ii) The deportee may only be detained for a period that is reasonable in all the circumstances;

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;

(iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.”

39. The *Hardial Singh* principles are consistently adopted in Hong Kong and it is accepted that the discretionary executive detention powers under section 32 of the IO do attract the application of *Hardial Singh principles*.

40. As noted by Ribeiro PJ in *Ghulam Rbani* (at §33), whilst section 32(3A) does not lay down time-limits for effecting removal where there is a removal order in force, subsections (3D) and (4A) make it clear that the section recognizes that detention pending removal can only be

A justified for a period that is “is reasonable having regard to all the
B circumstances affecting [the detainee] detention” and that reasonableness
C is a matter to be determined by the court.

D 41. In *Bhullar Angad Singh v Hong Kong SAR Government*,
E unreported, HCAL 134/2014, 21.10.2014, at §17, Au J pointed out that so
F long as the Director is intent upon removing a person at the earliest
G possible moment and the Director remains reasonably of the view that he
H can do so within a reasonable period of time and that it will not be
I impossible for him to remove the person within that reasonable period of
J time, then the Director is entitled to continue to detain in the exercise of
K his discretion.

The grounds advanced on behalf of the applicant

L 42. Mr Tibbo was unable to prepare a skeleton submission. At
M the hearing, he clarifies that he complains about both the unlawfulness of
N the initial detention and the failure of the Director to act with due
O diligence. For the latter complaint, Mr Tibbo relies on *Ghulam Rbani*.

O 43. When asked why the detention of the applicant purportedly
P pursuant to sections 32(1)(a) and 37ZK was unlawful in the first place,
Q Mr Tibbo submits that many other persons having made their
R non-refoulement claims were allowed release on their own recognizance
S and there is no reason why the applicant should be singled out and
T deprived of his liberty. He does not argue that the detention was without
U legal basis.
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44. Indeed, Ribeiro PJ in *Ghulam Rbani* (§35) observed that it must throughout be borne in mind that it does not follow that a person who may be made the subject of a removal order should be locked up or should continue to be detained while the decision whether to order removal is taken or while awaiting removal. Such persons are often allowed to remain at liberty on their own recognizance or with the support of sureties or guarantors.

45. From the chronology of events set out above, throughout the Director made regular reviews of the detention of the applicant. There is no allegation that the specified factors taken into account in such reviews were in any way erroneous. There is not any evidence that the applicant did have a fixed place of abode in Hong Kong or that he had close connection (family or friends) in Hong Kong and that the applicant made it known to the Director. In the circumstances, I do not think the Director can be faulted in coming to the conclusion that the initial detention and the continued detention of the applicant pending the final determination of his non-refoulement claim were justified.

46. Furthermore, on the evidence, I accept that the applicant's non-refoulement claim was processed and determined expeditiously. The applicant cannot be heard to complain that he had been detained for an unreasonably long period of time since he completed his application by filing his NCF on 3 February 2015.

46. I am far from convinced that the detention under sections 32(1)(a) and 37ZK was unlawful. The applicant's complaint is devoid of merit in my judgment.

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47. Mr Tibbo goes on to submits that a six-week detention was considered unlawful in *Ghulam Rbani* and hence in the present case, the applicant's detention since December 2014 must be unlawful.

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48. I cannot accept this submission. It is clear that the Court of Final Appeal in *Ghulam Rbani* did not intend to lay down any time limits for effecting removal. All of the circumstances affecting a detainee's detention in a particular case must be taken into account. I find no culpable delay in the determination of the applicant's non-refoulement claim on the evidence. It should be noted that the Director was ready to deport the applicant less than a week after the Decision was made.

49. Mr Tibbo further makes a detailed submission on the alleged unfairness of the way the applicant's non-refoulement claim was handled, notwithstanding the legal representation afforded by DLS. He submits that he is confident that the Notice of Decision and the Decision should be liable to be set aside in the intended judicial review of the applicant to be commenced with the assistance of the Legal Aid Department. He complains that the Director adopts an underhand approach towards the applicant and uses the Removal Order to foil the applicant's attempt to seek proper legal advice from him and challenge the Notice of Decision and the Decision and commence other appropriate proceedings in Hong Kong against the authorities.

50. I need not go into any detail of this submission. Suffice it to say that I am not impressed at all. In any event, it has no bearing on the question of the lawfulness of the detention of the applicant. Those complaints of the applicant should be investigated elsewhere.

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51. To reiterate, again from the chronology of events, I cannot find any culpable delay on the part of the Director to execute the Removal Order at all. I fail to see how the Director has acted in breach of the *Hardial Singh* principles, thereby rendering his initially lawful detention unlawful at any stage.

Conclusion and Order

52. For the reasons given above, I cannot accept that the detention of the applicant is in any way unlawful. I dismiss the applicant's application for a writ of *habeas corpus* by the OS.

53. I make no order as to costs. I further direct that the Removal Order should not be executed before 4:00 p.m. on 1 June 2015.

(Kent Yee)
Deputy High Court Judge

Mr Robert Tibbo, instructed by T.H. Koo & Associates, for the applicant

Mr Lawrance Chan, Government Counsel of the Department of Justice
for the putative respondent