

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS CASE NO 1872 OF 2015**

BETWEEN

HKSAR

Respondent

and

TAROK DAS

Applicant

Before: Hon Zervos J in Chambers

Dates of Hearing: 6 and 11 August 2015

Date of Reasons for Decision: 11 August 2015

REASONS FOR DECISION FOR BAIL

1. The applicant, Tarok Das, applies for bail following the refusal of a previous application in the Magistrate's Court on 29 July 2015. He is before the court on a charge for the offence of breach of condition of stay, contrary to section 41 of the Immigration Ordinance, Cap 115.

2. It is necessary that I set out the background to this case, as it reveals a situation that is all too familiar with the courts, and is becoming an increasing problem with no end in sight. See *HKSAR v Eftakhar Beg*, HCMA 262/2015, 6 July 2015, unreported.

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B 3. The applicant entered Hong Kong lawfully on 8 March 2005
C and was permitted to stay as a visitor until 22 March 2005. The applicant
D however overstayed and remained in Hong Kong without detection by the
E authorities until 29 November 2011 when he was arrested by the police for
overstaying.

F 4. In December 2011 he lodged a torture claim and was then
G released by the Immigration Department on recognizance on 7 January
H 2012. On 16 April 2012 he was charged for the breach of condition of stay
I offence and required to appear at the Magistrate's Court on 18 April 2012
J but failed to attend. A warrant of arrest was issued against him. It would
appear that efforts had been made to locate the applicant for three years but
without success.

K 5. On 14 April 2015 the police caught up with the applicant and
L arrested him pursuant to the arrest warrant. He was brought before the
M Magistrate's Court on the following day in relation to the breach of
N condition of stay offence and his case was adjourned to 29 April 2015 in
O order to inquire as to the outcome of his torture claim. The magistrate
P refused to grant him bail because of his failure to attend court on the
precious occasion.

Q 6. In the meantime, on 18 April 2015, the applicant filed a non-
R refolement claim under the United Screening Mechanism.

S 7. At the adjourned hearing on 29 April 2015 the magistrate was
T informed that the applicant's torture claim had been refused in March 2013
U and that he had recently made a non-refoulement claim. The prosecution
V

adjourned the case for three months to 29 July 2015 in order to inquire as to the outcome of the non-refoulement claim. Bail was refused.

8. At the adjourned hearing on 29 July 2015 the magistrate was informed that the outcome of his claim was not yet known and the prosecution adjourned the case for another three months to 29 October 2015. Bail was again refused. Hence the present application.

9. The applicant has been in Hong Kong for over 10 years. He came here in 2005 and had been overstaying for some six years before his unlawful presence was detected. He was released on recognizance, but when he was later charged for the breach of condition of stay offence he failed to attend a court hearing and report under the recognizance. He remained undetected for some three years until he was arrested again.

10. It is submitted by the respondent that the applicant has shown a disregard for the law and there is a substantial risk that he might deliberately breach a court order and fail to answer court bail. However, it has also been pointed out that on the relevant sentencing authorities he has practically served a sentence that is likely to be imposed upon him for this offence.

11. There is another aspect of this case that warrants comment. It is fair to say that the circumstances of this case are not uncommon and cases similar to this one frequently come before the courts. The cases I am referring to concern a foreign national who enters Hong Kong either illegally or lawfully but on a visitor's visa for a limited period, and remains here for as long as he can until detected and apprehended, and then avoids or defies the legal processes and/or makes a claim or a series of claims for

A protection under an international convention in order to continue to remain
B here. After criminal proceedings have been instituted against the person,
C the case is frequently brought before the courts because of adjournments or
D other applications and eventually it is placed in abeyance pending the
E outcome of the convention claim. As is sometimes seen, a claim for
F protection under an international convention is not made at the earliest
G opportunity, as one would expect, but only after the person has been
H apprehended by the authorities and it would appear in circumstances where
I on the face of the claim there may be little if any merit to it and in order to
delay the legal processes and allow the person to remain in Hong Kong in
the meantime, which in most cases can be many years.

J 12. It seems the relevant authorities take a standard approach to
K these cases, which may be due to the large quantity of them or the fixed
L procedure that has been implemented in dealing with them or a
combination of the two.

M 13. I am informed that the likely sentence to be imposed upon the
N applicant on a conviction of the charge which he faces is six months'
O imprisonment after trial. See *HKSAR v MD Sakib Ahmed*, HCMA
P 851/2012, 1 March 2013, unreported. He has been in custody since 14
Q April 2015 and has to date served any sentence that is likely to be imposed
for this offence. That alone warrants his immediate release.

R 14. I adjourned this application on 6 August 2015 to today for the
S prosecution to provide further information in relation to the progress of the
T applicant's claim which was submitted on 24 April 2015. I am informed
U that the Immigration Department has confirmed that the processing time of
a non-refoulement claim varies according to the merits of the individual
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case and whether the claimant is cooperative or not, but on average takes about 25 weeks. This is of course subject to any petition lodged to the Non-Refoulement Petition Office and any other legal action.

15. In the applicant's case, I am informed that his previous torture claim in 2011 was made under the Torture Convention and was rejected on 9 March 2012 because it was determined that there was no substantial ground for believing that he would be in danger of being subjected to torture in his home country. The non-refoulement claim that he recently made is on the ground of torture risk but under Article 3 of the Hong Kong Bill of Rights.

16. I will grant the applicant bail for the reason that I have given but I hope that the relevant authorities will address the problem that has been briefly described by me in very general terms. There are no doubt genuine cases for convention claims deserving of due process and consideration by the relevant authorities but it seems more needs to be done to weed out promptly the unmeritorious and unworthy claims. As I have previously indicated this is becoming a serious problem for the courts and the legal system in general, as well as for the community, and there is the added risk that the system in place is being abused not only by unmeritorious claimants but possibly by claimants with a more sinister purpose in mind.

(Kevin Zervos)
Judge of the Court of First Instance
High Court

Mr Jones Tsui, SPP of the Department of Justice, for the respondent
Applicant in person