FACV No. 15 of 2013

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 15 OF 2013 (CIVIL)
(ON APPEAL FROM CACV NO. 267 OF 2011)

Between :

GHULAM RBANI — Plaintiff (Appellant)

and

SECRETARY FOR JUSTICE for and on behalf of the DIRECTOR OF IMMIGRATION — Defendant (Respondent)

Before: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Bokhary NPJ and Lord Walker of Gestingthorpe NPJ

Date of Hearing: 25 February 2014

Date of Judgment: 13 March 2014

J U D G M E N T

Chief Justice Ma:

1. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Ribeiro PJ:

2. The appellant brought proceedings against the Director of Immigration for damages for false imprisonment claiming that he had been unlawfully detained purportedly under section 32 of the Immigration Ordinance ("IO").[1] His claim was dismissed by HH Judge Leung in the District Court[2] and his appeal against that judgment was dismissed by the Court of Appeal.[3] Leave to appeal to this Court was given by the Appeal Committee[4] on the basis that a point of law of the requisite importance arises on the appeal, namely:

> "To what extent are the detention powers contained in section 32(2A) of the IO subject to an applicable principle of law barring arbitrary or unlawful detention?"

A. The factual background

3. The appellant may be described as a serial over-stayer. He is a Pakistani national and first came to Hong Kong in 1992 using a passport bearing the name "Ghulam Rubbani" and stating his date of birth as 15 April 1971. He was allowed to stay for three months but overstayed for about 10 months. He was convicted of breaching a condition of stay, fined $1,000 and repatriated to Pakistan in August 1993.

4. Using another passport, this time in the name of "Mian Ghulam Rabani", giving 15 April 1970 as his date of birth, the appellant returned to Hong Kong in 1994. He was again permitted to stay for 3 months and overstayed for some 5 months. He was again convicted of breaching a condition of stay, fined $1,200 and repatriated to Pakistan in July 1995.

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1 Cap 115.

2 DCCJ 531/2010 (13 October 2011).

3 Cheung CJHC, Stock VP and Fok JA, CACV 267/2011 (4 December 2012).

4 Ma CJ, Chan and Tang PJJ, FAMV 20/2013 (9 August 2013).

5. He returned in May 1999, this time using a passport in the name of "Ghulam Rabbani" with a 1967 date of birth. After overstaying for about 4 months, he was convicted of breaching his condition of stay and of making a false representation to an officer (during his previous visit regarding his date of birth). He received a sentence of 3 months' imprisonment suspended for two years and was sent back to Pakistan in October 1999.

6. The appellant last entered Hong Kong on 24 September 2000 (this time using a passport bearing the name "Ghulam Rbani", with a 1971 date of birth). He was permitted to remain as a visitor until 15 October 2000 but overstayed for some 4½ years before he was arrested by the police on 1 April 2005 for a gambling offence. He was convicted of that offence as well as of breaching his condition of stay. The suspended sentence was activated and he was sentenced to a total of 7 months' imprisonment.

7. After serving just under five months of his sentence, he was discharged on 23 August 2005. The Director immediately placed him under administrative detention pursuant to IO section 32(2A)(a) and subsequently issued a removal order against him on 10 September 2005. That order was not served because the appellant had meanwhile lodged a claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") against refoulement which came to the attention of the Immigration Department's Removal Sub-Division on 12 September 2005.

8. The removal order was revoked on 15 September 2005 and the appellant was eventually released on recognizance on 7 October 2005, approximately six weeks since he was first placed under administrative detention and three weeks since revocation of the removal order. The appellant's claim for damages for false imprisonment was brought on 11 February 2010, some 4½

years after his release. I shall return [5] to consider in greater detail the circumstances of his detention.

B. The appellant's claim

9. As Lord Bridge of Harwich stated in *R v Deputy Governor of Parkhurst Prison, Ex p Hague*: "The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it."[6] Citing Atkin LJ for the proposition that "any restraint within defined bounds which is a restraint in fact may be an imprisonment",[7] Lord Bridge continued:

> "Thus if A imposes on B a restraint within defined bounds and is sued by B for false imprisonment, the action will succeed or fail according to whether or not A can justify the restraint imposed on B as lawful."[8]

10. There is no dispute that the period of the appellant's confinement under executive detention constituted a period of imprisonment. The question is therefore whether the Director (who bears the burden[9]) can justify such detention as lawful.

11. Mr Philip Dykes SC[10] advances five arguments for contending that the Director is unable to provide such justification. Two involve reliance on constitutional guarantees and the other three bear on the scope and proper exercise

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5 In Section G of this judgment.

6 [1992] 1 AC 58 at 162. Adopted in *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at §40; and *R (WL (Congo)) v Home Secretary (SC (E))* [2012] 1 AC 245 at §65.

7 *Meering v Grahame-White Aviation Co Ltd* (1919) LT 44 at 54.

8 [1992] 1 AC 58 at 162.

9 *R v Home Secretary ex p Khawaja* [1984] 1 AC 74 at 110; *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2003] UKHRR 76 at §60.

10 Appearing with Mr Hectar Pun for the appellant.

of the statutory power of detention as a matter of public law forming part of the common law.

12. In making his constitutional arguments, Mr Dykes submits that the detention was unlawful in that it violated Article 5(1) of the Bill of Rights ("BOR Art 5(1)") and/or Article 28 of the Basic Law ("BL Art 28") made applicable to the appellant by Article 41 of the Basic Law ("BL Art 41"). Those Articles are set out below.[11]

13. The powers of detention relied on by the Director are contained in IO section 32,[12] being powers to detain pending a decision on whether to make a removal order (section 32(2A)); and pending removal where a removal order has been made (section 32(3A)).

14. In his public law argument, Mr Dykes submits that the Director's purported exercise of the powers conferred by those sections in the present case was flawed and unlawful for three inter-related reasons, namely:

(a) that applying the *Hardial Singh* principles,[13] the Director[14] could not lawfully continue to detain the appellant after it had become clear that his intended removal from Hong Kong could not be achieved within the time limits for detention laid down in section 32(2A) or otherwise within a reasonable time ("the *Hardial Singh* ground");

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11 In Section K of this judgment.

12 Set out in Section D.1 below.

13 A reference to the principles laid down in the judgment of Woolf J in *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704; discussed in Section D of this judgment.

14 And, where applicable under section 32(2A), the Secretary for Security. For brevity, I will refer simply to the Director.

(b) that once the removal order was revoked on 15 September 2005, there was no legal basis for the continued exercise of the power ("the no legal basis ground"); and

(c) that at the time of exercising the power, the Director had not published any statement of policy identifying criteria justifying detention under section 32 ("the lack of a policy ground").

15. The first two of the abovementioned grounds involve the complaint that the duration of the appellant's detention was excessive and cannot fully be justified, while the third ground involves the contention that the Director's lack of a published policy tainted the entire period of detention.

16. It is Mr Dykes's argument that on one or more of the aforesaid grounds, the detention was rendered unlawful, not merely as a matter of public law, but so as to constitute the tort of false imprisonment entitling the appellant to damages, this being a proposition which will also require examination.[15]

17. As Lord Brown of Eaton-Under-Heywood JSC pointed out,[16] the *Hardial Singh* principles, as applied in a succession of later cases, may be regarded as more favourable to detainees than the Strasbourg jurisprudence[17] requires. In like vein, Mr Dykes accepts that if his argument based on public law principles succeeds, the constitutional grounds would add nothing to the result. The focus of the argument has therefore been on the common law and public law

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15 In Section L below.

16 *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at §94. See also Lord Hope of Craighead DPSC at §59.

17 Regarding the protection of the right to liberty and security of the person under Article 5 of the European Convention on Human Rights.

principles and I shall deal with them first, before considering the constitutional arguments raised.

C. The right at common law

18. The right to personal freedom and the concomitant right to be protected from arbitrary arrest or detention form part of the bedrock of the common law. Referring to an argument advanced by one of the parties in *A and Others v Secretary of State for the Home Department*,[18] Lord Bingham of Cornhill commented:

> "In urging the fundamental importance of the right to personal freedom ... the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day."

19. As Lord Bridge emphasised in *Ex p Khawaja*, this right is of particular importance where an individual is subjected to executive detention:

> "My Lords, we should, I submit, regard with extreme jealousy any claim by the executive to imprison a citizen without trial and allow it only if it is clearly justified by the statutory language relied on. The fact that, in the case we are considering, detention is preliminary and incidental to expulsion from the country in my view strengthens rather than weakens the case for a robust exercise of the judicial function in safeguarding the citizen's rights."[19]

20. These fundamental values apply with equal vigour in Hong Kong, safeguarded by, among other means, the writ of habeas corpus.[20] Giving the advice of the Privy Council in an appeal from Hong Kong,[21] Lord Browne-Wilkinson endorsed Lord Bridge's statement just cited and emphasised that:

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18 [2005] 2 AC 68 at §36.

19 *R v Home Secretary, ex p Khawaja* [1984] 1 AC 74 at 122.

20 As provided for by section 22A of the High Court Ordinance (Cap 4).

21 *Tan Te Lam and Others v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 113-114.

> "Such an approach is equally applicable to everyone within the jurisdiction of the court, whether or not he is a citizen of the country..."[22]

D. Hardial Singh principles

21. In *R v Governor of Durham Prison, ex p Hardial Singh,*[23] Woolf J (as Lord Woolf of Barnes then was) had to deal with a habeas corpus application by a person against whom a deportation order had been made and who was detained under statutory powers authorising his detention pending removal.[24] The powers were not subject to any express limitation of time but, given the vital importance of the right to personal freedom, Woolf J construed them as subject to certain implied limitations relating to the purpose of the powers, the duration of the detention permitted and the Secretary of State's obligation to act with due diligence.[25]

22. Those limitations became known as the *Hardial Singh* principles and have consistently been adopted in Hong Kong,[26] including by this Court which described them as representing "the proper approach to the statutory construction of any statutory power of administrative detention".[27]

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22 Referring to Lord Scarman in *Ex p Khawaja* at 111-112.

23 [1984] 1 WLR 704.

24 Immigration Act 1971, Sch 3, paragraphs 2(2) and 2(3) set out in Section J.3 below.

25 [1984] 1 WLR 704 at 706.

26 *Tan Te Lam and Others v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111; *Chieng A Lac & Others v The Director of Immigration & Others* [1997] HKLRD 271 at 277-278; *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 at §27-28.

27 *Thang Thieu Quyen v Director of Immigration & Another* (1997-98) 1 HKCFAR 167 at 185-186.

23. The principles have been conveniently summarised by Dyson LJ (as Lord Dyson then was) in *R (I) v Secretary of State for the Home Department*,[28] as follows:

> "(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
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> (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
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> (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."

I shall refer to them as the 1st, 2nd, 3rd and 4th *Hardial Singh* principles, respectively.

24. His Lordship further explained:

> "Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person 'pending removal' for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired."[29]

25. The position at common law was summed up by Lord Hope in *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* in terms applicable to the claim in the present case:[30]

> "I would start therefore with principle that must lie at the heart of any discussion as to whether a person's detention can be justified. The liberty of the subject can be interfered

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28 [2003] INLR 196 at §46. The summary was approved by the UK Supreme Court in *R (WL (Congo)) v Home Secretary* [2012] 1 AC 245 at §22.

29 At §47.

30 [2011] 1 WLR 1299 at §49.

with only upon grounds that the court will uphold as lawful.[31] In *Ex p Evans (No 2)* Lord Hobhouse of Woodborough said:[32] 'Imprisonment involves the infringement of a legally protected right and therefore must be justified. If it cannot be lawfully justified, it is no defence for the defendant to say that he believed that he could justify it.' We are dealing in this case with the power of executive detention under the 1971 Act. It depends on the exercise of a discretion, not on a warrant for detention issued by any court. That is why the manner of its exercise was so carefully qualified by Woolf J in *Ex p Hardial Singh*. The power to detain must be exercised reasonably and in a manner which is not arbitrary. If it is not, the detention cannot be lawfully justified."

E. IO section 32

26. The Director submits that the appellant's detention was lawfully justified pursuant to a proper exercise of the powers conferred by IO section 32. The provisions of principal relevance provide as follows:

> *Section 32*
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> ...
>
> (2A) A person may be detained pending the decision of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration as to whether or not a removal order should be made under section 19(1)(b)[33] in respect of that person-
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> (a) for not more than 7 days under the authority of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration;
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> (b) for not more than a further 21 days under the authority of the Secretary for Security; and
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> (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 paragraphs (a) and (b).
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> ...
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> (3A) 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

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31 Citing *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19 at 35; and *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111.

32 [2001] 2 AC 19 at 42.

33 Section 19(1)(b) identifies the classes of persons who may be detained. Its terms are set out in Section F below.

> Director of Immigration or any assistant director of immigration pending his removal from Hong Kong under section 25.

F. The applicability of the Hardial Singh principles to section 32

27. Section 32 confers discretionary executive detention powers which attract the application of *Hardial Singh* principles. However, it is important to note that the Director is not given an unlimited discretion but can only exercise his powers subject to certain built-in statutory limitations.

28. Thus, the powers are only exercisable against persons who can be made subject to a removal order under IO section 19(1)(b) which materially provides:

> *Section 19(1)(b)*
>
> "A removal order may be made against a person requiring him to leave Hong Kong by the Director if it appears to him that that person ...
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> (i) might have been removed from Hong Kong under section 18(1) if the time limited by section 18(2) had not passed;
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> (ii) has ... landed in Hong Kong unlawfully or is contravening or has contravened a condition of stay in respect of him; or ...
>
> (iia) not being a person who enjoys a right of abode ... or has the right to land ... has contravened section 42;
>
> (iii) being a person who ... may not remain in Hong Kong without the permission of an immigration officer or immigration assistant, has remained in Hong Kong without such permission."

29. In other words, the powers of detention under sections 32(2A) and 32(3A) can only be used against persons who (i) could have been refused permission to land within two months of their arrival;[34] (ii) landed unlawfully or

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[34] IO section 18 relevantly states: "(1) Subject to subsection (2), an immigration officer or a chief immigration assistant may remove from Hong Kong (a) ... a person who ... is under section 11(1) refused permission to land; ... (2) A person who is refused permission to land in Hong Kong may not be removed from Hong Kong under subsection (1)(a) after the expiry of 2 months beginning with the date on which he landed."

are here in breach of a condition of stay; (iia) not having a right of abode or right to land, committed immigration offences involving making false statements or the use or possession of false documents; or (iii) are here without necessary permission to remain.

30. One might add that although section 19(1)(b) identifies a person as a potential subject of a removal order (and therefore of detention) if "it appears to [the Director]" that such person comes within one of the specified categories, membership of one such category is what the Privy Council has called "a jurisdictional fact"[35] – a fact which goes to the Director's jurisdiction to detain. Such membership must be capable of being objectively established by the Director on the balance of probabilities as a pre-condition of any detention and is not merely a matter of the Director's subjective opinion.

31. The section 32(2A) power is also subject to specified time-limits for its exercise, with a requirement for successive reviews and higher-level authorisation where detention is to continue beyond the first seven-day period.

32. Furthermore, the power to detain under section 32(2A) is implicitly limited to detention for the purpose of taking steps, such as making relevant inquiries, needed to arrive at the decision whether to make a removal order. This appears from 32(2A)(c) which states that second 21 day extension may be authorised "where inquiries for the purpose of such decision have not been completed".

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[35] *Tan Te Lam and Others v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 113.

33. While section 32(3A) does not lay down time-limits for effecting removal where there is a removal order in force, subsections (3D) and (4A)[36] make it clear that the section recognizes that detention pending removal can only be justified for a period that is "is reasonable having regard to all the circumstances affecting [the detainee's] detention" and that reasonableness is a matter to be determined by the court.

34. Within the framework of the aforesaid statutory conditions, the Director has a discretion to decide whether to detain or continue the detention of a particular individual who falls within a class of persons eligible for detention; and the Secretary has a discretion whether to extend and continue a particular detainee's detention.

35. Each of the *Hardial Singh* principles is potentially relevant to those decisions. 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.

36. I pause to note that the *Hardial Singh* principles as formulated above address only detention pending removal – the position which arose under the pertinent UK legislation in that case and which arises under IO section 32(3A). It is however clear that, suitably adapted, the principles are also applicable to the

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[36] Section 32(3D): "For the further avoidance of doubt, nothing in subsection (3B) shall prevent a court, in applying subsection (4A), from determining that a person has been detained for an unreasonable period."

Section 32(4A): "The detention of a person under this section shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances affecting that person's detention including, in the case of a person being detained pending his removal from Hong Kong- (a) the extent to which it is possible to make arrangements to effect his removal; and (b) whether or not the person has declined arrangements made or proposed for his removal."

earlier phase of detention pending a decision whether or not to make a removal order under section 32(2A).

G. The circumstances of the appellant's detention

37. Mr Dykes' *Hardial Singh* ground of complaint makes it necessary to examine in some detail the circumstances of the appellant's detention.

38. As we have seen, the appellant was due to be discharged from prison on 23 August 2005 after serving just under five months of his seven-month sentence. As his release date approached, he made several requests[37] to the Director to be repatriated to Lahore in Pakistan in order to be with his sick son and aged mother.

39. Upon his release from prison, he was immediately detained at the Castle Peak Bay Immigration Centre. In a subsequent memo,[38] the Director stated that such detention was "for enquiries under section 32(2A)(a) ... pending the decision as to whether or not a removal order should be made".

40. On 24 August, he repeated his request to be returned to Pakistan, saying that his passport had been lost and that he needed help with the purchase of an air ticket. This led to the Director writing the next day to the Consulate General of Pakistan, asking for an emergency passport to be issued to the appellant for his passage home. Since the initial seven-day period of his detention was about to expire, authority was sought from the Secretary for Security to detain him for a further period of not more than 21 days from 30 August 2005 under section 32(2A)(b) on the basis that "enquiries are continuing and are unlikely to be concluded before the expiry" of the initial period. Authority for an extension

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[37] At an Immigration Department interview on 12 August 2005; by a handwritten letter dated 18 August 2005 and at a further interview on 23 August 2005.

[38] Dated 29 August 2005.

"pending a decision as to whether or not a removal order should be made under section 19(1)(b)" was given on 29 August.

41. On 2 September, the Pakistan Consulate General issued the appellant a passport and the Director procured him an air ticket. On 5 September, a recommendation was made to process a removal order, noting that the appellant "was under the detention authority section 32(2A)(b) which will lapse on 19.9.05". On 7 September, a file minute reviewing the appellant's case recorded that he had assumed four different identities, been in breach of a condition of stay and had refused to answer questions about his different identities. It recommended issue of a removal order and was endorsed by more a senior officer on 8 September. On 10 September, a removal order was made.

42. That was done in ignorance of the fact that the appellant had meanwhile lodged a CAT claim which arrived at the Immigration Department on 8 September and reached the Department's Removal Sub-division on 12 September. A file minute dated 13 September recited the appellant's immigration and criminal record, noted that the removal order had not been served and recommended that the case be passed on to the CAT Section.

43. A file minute dated 15 September again recounted the appellant's record; noted that he had kept silent when asked about his multiple identities; and noted that he had not indicated any fear of torture in Pakistan before 5 September 2005. The minute added that in issuing the extant removal order, "the ... subject torture claim had not been taken into consideration" and recommended that the removal order be withdrawn and that the appellant's detention be continued. That recommendation was accepted up the chain of command and the removal order was revoked on the same day, 15 September, with one superior officer adding that the Secretary's authority would be sought to detain the appellant under section 32(2A)(c), "KIV [keeping in view] the development of the CAT

assessment" and that the Department would "review subject's detention IDC [in due course]".

44. Detention for "a further period of twenty one days pending the decision of the Director ... as to whether or not a removal order should be made under section 19(1)(b)" was authorised under 32(2A)(c) on 16 September 2005.

45. The first mention of the appellant's possible release from detention appears in a memo dated 21 September 2005 from the Director to the Commissioner of Police, which, after setting out the appellant's history, stated: "Currently we are considering to release [the appellant] on immigration recognizance pending [the Director's] decision as to whether a removal order should be made against him. In this connection, please kindly advise whether you have any objection [to the appellant's release on recognizance]". On the same day, the appellant's CAT assessment began, with an interview by the Department's CAT Section. Two days later, on 23 September, the Commissioner replied that he had no comment.

46. On 26 September 2005, the appellant was asked to nominate a guarantor for his release, but he was unable to do so until 28 September, when the guarantor gave certain undertakings to the Director. The appellant went for a further CAT interview on 29 September and, on 3 October, a file minute containing a detailed review of his case ended with a recommendation stating: "Considering that the removal order ... has been withdrawn, it is recommended that he be released on recognizance" on stated terms as to a surety, weekly reporting, details of his address and his not taking employment. Release was authorized on 5 October and on 6 October, the appellant was told that he would be released on the following day when an Urdu interpreter would be available to explain the terms of his release. He was released on recognizance on 7 October 2005.

H. The Hardial Singh ground

47. As noted above, the *Hardial Singh* ground involves the complaint that the duration of the appellant's detention cannot be justified. Mr Dykes' main submission is that revocation of the removal order on 15 September 2005 due to the lodging of the CAT claim, shows that the Director must have realised that a decision on a removal order could not be reached within the maximum time allowed for detention under section 32(2A) given the time obviously needed to determine the CAT claim. It was, he argues, thereafter unlawful to keep the appellant in detention. So put, it is an argument based mainly on the 3rd *Hardial Singh* principle.

48. However, Mr Dykes also seeks to argue (on the basis of the 2nd *Hardial Singh* principle) that the duration overall was in any event unlawful, being unreasonable in all the circumstances. I therefore turn to consider the successive phases of the appellant's detention.

H.1 Detention from 23 August to 15 September 2005

49. Although there was no direct statement of the reason for detaining the appellant immediately upon his release from prison, the reviews of the appellant's history in the case file demonstrate that he was detained because of his repeated offences of over-staying. The file minutes point to his having used four different identities, to his refusing to answer questions about those identities and to the fact that he had been convicted of breaching his conditions of stay – the last matter being a jurisdictional fact qualifying the appellant for detention. It is obvious that the Director considered it proper to detain the appellant because he presented a real risk of absconding and going to ground. In my view, the initial decision to detain the appellant was plainly lawful.

50. Keeping him in detention pursuant to section 32(2A)(a) for the first seven days (which ended on 29 August) was also clearly lawful. Throughout that period, he was pressing the Director to repatriate him to Pakistan as soon as possible. The Director acted diligently and expeditiously to enable his return. The appellant needed a travel document so on 25 August, the Director wrote to the Pakistan Consulate requesting that he be issued with an emergency passport. A passport was duly issued on 2 September, by which time, the seven day period of detention authorized under section 32(2A)(a) had expired.

51. On 29 August, the Director obtained from the Secretary of Security authority to continue the detention for not more than 21 days commencing on 30 August pursuant to section 32(2A)(b). The grant of that extension cannot be criticised. The reasons for detaining the appellant continued to hold good and the appellant's voluntary repatriation was being processed. The Director plainly expected to make a removal order when the arrangements for his return to Pakistan were in place. Thus, when the emergency passport was issued on 2 September, the Director took steps to secure the appellant an air ticket for his return to Pakistan and on 10 September, pursuant to a recommendation made on 7 September, a removal order was duly made.

52. It was at that point that a new development arose, involving the appellant's change of mind about returning to Pakistan and his lodging of a torture claim. It is somewhat odd that, having been received at the Immigration Department on 8 September, it took four days for news of the new development to reach the Removal Sub-division, raising a question as to whether the Director had acted with reasonable diligence and expedition as required by the 4th *Hardial Singh* principle. However, that does not appear to have been explored in the evidence. No doubt, from the viewpoint of the officers dealing with his removal, his repatriation which would end the detention was being reasonably and diligently processed.

53. Once it was realised by those officers that the appellant had changed his mind and now resisted being returned to Pakistan allegedly for fear of being tortured there, it was quite properly decided to refer his claim to be assessed by the CAT Section. It was also perfectly proper to revoke the existing removal order on the basis that it could not be proceeded with, having been issued without taking account of the CAT claim. It was furthermore quite reasonable for the Removal Section to adopt the stance that they should keep in view the CAT Section's assessment and review the appellant's detention in due course. Given the fact that the appellant had been back and forth between Hong Kong and Pakistan and that he had never previously suggested a fear of torture, but on the contrary, had been pressing for his rapid return to that country, one cannot fault the officers dealing with his removal for wishing to see what the CAT Section would make of the appellant's *volte-face* before deciding whether he had to be released.

54. I therefore do not accept that the Court should infer from the revocation on 15 September of the removal order that the Director had by then already concluded that the appellant could not be removed within the detention time limits specified in section 32. It was revoked because it could not be proceeded with without consideration given to the CAT claim and it was not out of the question that removal might be possible within the time remaining.

H.2 Detention from 16 September to 7 October

55. What is *not* so readily acceptable, is the time taken for the process to unfold after 15 September. After a recommendation was made on 13 September to pass the file to the CAT Section and after revocation of the removal order on 15 September, it was envisaged that a decision on removal could not be reached before the then authorized period of detention expired on 19 September. Authority was therefore obtained on 16 September for a further 21 day extension

under 32(2A)(c) beginning on 20 September. However, the CAT assessment process did not start until the appellant was first interviewed on 21 September, nine days after the claim reached the Removal Section and 13 days after it had first been received by the Immigration Department. It has to be borne in mind that in such cases, while the file is being passed from one officer to another, the appellant is being held in detention, deprived of his personal freedom, recognized both at common law and under our constitutional guarantees as a fundamental right. It is incumbent on the Director to process the case with a sense of urgency and to come promptly to a decision whether detention should continue. There is no explanation as to why the assessment could not have taken place much sooner.

56. The pace of dealing with the case did not improve. As we have seen, by 21 September, the appellant's release was under consideration and the Commissioner of Police was being asked whether he had any objections. That point should have been reached some days sooner, in tandem with an earlier CAT assessment, if the process had been pursued with greater diligence and expedition as required by the 4th *Hardial Singh* principle.

57. It is furthermore difficult to understand why it was not until 26 September that the appellant was asked to nominate a guarantor. That occurred five days after his possible release was mooted and three days after it was clear that the Commissioner of Police had no interest in the appellant. The appellant managed to secure a guarantor two days later, on 28 September. It is evident from the events which followed that once the Commissioner's lack of objection was known, it only remained to process the mechanics of release. There is no apparent reason why the appellant was not asked to secure a guarantor say, on 24 September, the day after the Commissioner's response was obtained. More damagingly, there is no evident reason why it was not until 3 October that a recommendation for his release was made (5 days after a guarantor had been found) and not until 5 October that his release was authorized. There was then a

further delay to secure an Urdu interpreter to explain the terms on which he was to be released before he finally emerged from detention on 7 October. One assumes that the terms of the guarantee needed were explained to the appellant by an Urdu interpreter and it is difficult to see why the terms on which he might be released if a guarantor could be secured could not have been explained at the same time, or at any rate, at a time which did not delay his actual release.

H.3 Conclusion as to the Hardial Singh ground

58. For the foregoing reasons, I conclude that the appellant's detention up to 15 September was lawful. I also conclude that while a period of detention after 15 September can lawfully be justified, the actual period of detention was excessive and inconsistent with the 2nd, 3rd and 4th *Hardial Singh* principles.

59. When it became known that the appellant was making a CAT claim which would interrupt the removal process, that claim should rapidly have received a first assessment by the CAT Section to see whether it was manifestly untenable. Once it became clear that the CAT claim had to run its course, it would have been obvious that no decision to make a removal order could have been arrived at within the maximum period of detention permitted under section 32. Applying the 3rd *Hardial Singh* principle, steps should then have been taken without delay to effect the appellant's release. The steps actually taken, involving communication with the Commissioner of Police, the finding of a guarantor and explaining the terms of his release, ought to have been taken with far greater urgency.

60. In my view, looking at the position broadly, it is reasonable to conclude that using the reasonable diligence and expedition required by the 4th *Hardial Singh* principle, the entire process ought to have been completed some ten days sooner. I therefore conclude that the appellant's detention for six weeks was 10 days more than what was justifiable in all the circumstances. Accordingly,

I hold that on the *Hardial Singh* ground, the appellant is entitled to damages for false imprisonment for 10 days.

I. The "no legal basis ground"

61. The "no legal basis" argument is advanced on the premise that once the removal order was revoked on 15 September 2005, the Director no longer had in view the making of a removal order within the time limited and so had no legal basis for detaining the appellant under section 32. On the factual analysis conducted above, this ground fails. The removal order was revoked because it had been overtaken by the CAT claim. The continued detention was in contemplation of a fresh removal order possibly being made and, when it became clear that that was not going to happen in the time limited, detention was continued while arrangements were made for the appellant's release on recognizance. The unlawfulness I have found is based on dilatoriness and the unreasonableness of the detention's overall duration. The suggestion that the Director lacked power to detain because he had abandoned all intention to make a removal order once the issued order was revoked is not made out.

J. The "lack of a policy" ground

J.1 The appellant's argument and the decisions below

62. The appellant's argument on this ground is that the entire period of his detention was rendered unlawful because in August 2005 when he was detained, the Director had not published any statement of policy identifying the criteria to be adopted in exercising his powers under section 32.[39] The appellant's contention is that the Director was under a public law duty to exercise his powers

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[39] In 2008, policies identifying situations in which the section 32 powers are and are not likely to be exercised were published on the Immigration Department's website at http://www.sb.gov.hk/eng/special/pdfs/Detention%20policy-e.pdf.

of detention only in a certain and accessible manner and that this required him to publish policies identifying such criteria. Support for this argument is sought from two cases involving immigration detention recently decided by the United Kingdom Supreme Court, namely, *R (WL (Congo)) v Home Secretary*[40] and *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)*,[41] to which I shall return.

63. A similar argument was advanced in the Court of Appeal in *A (Torture Claimant) v Director of Immigration*[42] under the rubric of BOR Art 5(1) (and not as a domestic public law duty presently under consideration). The Court held that the grounds and procedure for detention under IO section 32 did not meet the requirements of certainty and accessibility laid down by BOR Art 5(1). It should however be noted that Tang VP (as he then was) emphasised that the question concerned the requirements of certainty and accessibility under BOR Art 5(1) and that his Lordship did not regard the Article as laying down an obligation to make and publish policies:

> "... we are here concerned with situations where art.5 of the HKBOR applies. Here the critical question is not whether there are policies as to the circumstances under which the power to detain might be exercised, the question is whether the grounds and procedure for detention are sufficiently certain and accessible, as is required by art.5. ..."[43]

> "Article 5 also requires that the grounds and procedure for the exercise of the power to detain must be certain and accessible. They could be made certain by a policy and accessible by publication. But the making of a policy is not the only way. Legislation, whether substantive or subsidiary, may do as well. But the question in every case must be, whether the grounds and procedure for detention are sufficiently certain and accessible."[44]

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40 [2012] 1 AC 245.

41 [2011] 1 WLR 1299.

42 [2008] 4 HKLRD 752.

43 At §40.

44 At §41.

64. A difficulty with the decision in the *A (Torture Claimant)* Case is that the effect of section 11 of the Hong Kong Bill of Rights Ordinance ("section 11") [45] was not considered.[46] In the District Court below, applying *Ubamaka* as decided in the Court of Appeal,[47] Judge Leung held that section 11 precluded the appellant's reliance on BOR Art 5(1)[48] and consequently held that the "lack of a policy" ground was not open to him.[49] However, His Honour indicated that if BOR Art 5(1) had been available, he would have found that the Director's powers as set out in the legislation alone were not sufficiently certain and accessible;[50] that the "power to detain"[51] was in breach of BOR Art 5(1) and thus unlawful;[52] that such unlawfulness was causally linked to the appellant's detention;[53] and that he would have assessed damages at $30,000.[54]

65. The Court of Appeal agreed with the Judge that reliance on BOR Art 5(1) was excluded by section 11 and that he was not bound to follow *A (Torture Claimant)*.[55] The "lack of a policy" argument was not directly dealt with, but the Court of Appeal evidently agreed with the Judge since it dismissed the Director's cross-appeal on the issue of damages. It upheld His Honour's posited breach of BOR Art 5(1) on the footing that there was "simply no evidence

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45 Cap 383. Section 11: "As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

46 As pointed out by the Court of Appeal below, §41.

47 *Ubamaka v Secretary for Security* [2011] 1 HKLRD 359.

48 Discussed in Section K.1 below.

49 Judgment §51.

50 Judgment §77.

51 The Judge may have meant "the detention" rather than "the power to detain".

52 Judgment §§83 and 85.

53 Judgment §109.

54 Judgment §158(3) and (4).

55 Court of Appeal §55, per Fok JA (as he then was).

of a published policy concerning the power of detention under section 32(2A)"[56] and that a causal link existed between such breach and the detention.[57]

J.2 Published policies and public law duties

66. I accept the submission of Mr Anderson Chow SC[58] that there is no public law duty generally requiring decision-makers to publish policies setting out their criteria for exercising statutory discretionary powers. The absence of such published policies does not of itself constitute a breach of a public law duty. However, especially where executive detention is involved, if the powers concerned are so broad and so lacking in specificity that legitimate doubts may arise as to the basis on which they are exercised in a particular case, published policies setting out relevant criteria may introduce the transparency needed as a safeguard against arbitrariness. This is of particular importance as a safeguard against arbitrary detention, but whether such a concern arises depends on case-specific considerations.

67. That there is no general duty to publish policies on discretionary powers is clear when one considers the place of such policies in the overall public law scheme. The legislature no doubt confers the relevant discretion on the decision-maker because flexibility is desired in the context. Where the power is expressed in broad terms, the legislature often authorizes the making of rules or regulations or codes of practice from which guidance and limitations on the exercise of the power will appear. Where no such rule-making powers are expressly provided for, the courts have recognized that the decision-maker may properly publish policies to give guidance and promote consistency, certainty and

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56 Court of Appeal §87.

57 Court of Appeal §89.

58 Appearing for the Director with Ms Grace Chow.

fairness.[59] Where this is done, those affected may have a legitimate expectation that the policies will be adhered to, although the decision-maker may be able to justify departing from those policies for good reason. It is necessary as a matter of public law to strike a balance between on the one hand, preserving a beneficial discretion which is not excessively fettered; and providing transparency to promote non-arbitrary decision-making on the other. Whether a public law duty to publish policies arises therefore depends very much on the nature of the discretionary power concerned and how it is exercised. As Sir Anthony Mason NPJ recently stated in *C and Others v Director of Immigration*:[60]

> "The exercise of a general statutory power may give rise to judicial review by reason of the way in which the power is exercised. One such example, which is relevant for present purposes, is where the decision-maker adopts a policy in order to provide guidance as to the way in which the power will be exercised and to promote consistency in its exercise. Or when the decision-maker makes a representation as to the way in which the power is exercised, including cases where the representation creates a legitimate expectation.
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> The adoption of a policy by a decision-maker exercising a very general discretion has the advantages of promoting certainty, consistency and administrative efficiency. It is, however, important that the policy adopted, whether general in character or confined to a class of persons, is not so rigid as to exclude the exercise of discretion by the decision-maker to consider the merits of the particular case and a willingness to depart from the policy, if need be, in a particular case, at least in the general run of cases. This is because the exclusion of a residual discretion as a result of a decision-maker applying a rigid policy might well, depending on the circumstances, be at variance with the very discretion created by the statute. However, where the decision-maker purports to exercise that discretion in accordance with the stated policy the manner of that exercise may be reviewed by the courts."

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[59] See the authorities cited in *De Smith's Judicial Review*, (Sweet & Maxwell, 7th Ed) §9-10.

[60] Chan, Ribeiro and Tang PJJ, Bokhary NPJ and Sir Anthony Mason NPJ, FACV Nos 18, 19 & 20 of 2011 (25 March 2013) at §§73-74.

J.3 The UK Supreme Court decisions relied on by the appellant

68. *WL (Congo)*[61] and *Kambadzi*[62] were both cases concerned with powers of detention exercisable by the United Kingdom Home Secretary in an immigration context. They were powers contained in the Immigration Act 1971, Schedule 3, paras 2(2) and 2(3) which provided as follows:

> "(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
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> (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)."

69. Those provisions do not lay down any conditions or criteria to be satisfied before detaining the individuals concerned. In para 2(2), all that is required is that the person (who is not the subject of a court order) be given notice that a decision has been made to deport him. That is the only condition specified for detaining him until the deportation order is made. And in para 2(3), if a deportation order is in force, he may be detained until his removal.

70. It is self-evident that the section 32(2A) and section 32(3A) powers of detention in our legislation are far less open-ended. As previously noted,[63] in the first place (by virtue of section 19(1)(b)), they are powers only available against persons who could have been refused permission to land; who landed unlawfully or have breached a condition of stay; who have no right of abode or

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61 *R (WL (Congo)) v Home Secretary* [2012] 1 AC 245.

62 *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299.

63 In Section F of this judgment.

right to land and have committed immigration offences involving making false statements; or who are here without permission to remain. Those are pre-conditions for detention rationally connected to a policy of detaining persons whose situation or past record indicates a risk of evading immigration control. Secondly, section 32(2A), unlike para 2(2) in the UK Schedule, sets a 49 day maximum for detention pending the making of a removal order; and furthermore breaks up that period into three parts, requiring each of the two possible extensions beyond the initial 7 days' detention to be subject to a review and a fresh authorization at the higher, Secretary for Security, level. Thirdly, section 32(2A) impliedly identifies as the limited purpose of the detention the conducting of inquiries[64] relevant to deciding whether to make a removal order. And fourthly, subsections (3D) and (4A) of section 32 limit the period of detention pending removal under section 32(3A) to what is reasonable in all the circumstances, expressly acknowledging that "reasonableness" is subject to judicial scrutiny.

71. It is not surprising that when referring to the ostensibly unlimited detention powers in the UK legislation, Lord Dyson JSC stated:

> "The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements."[65]

72. The problem in *WL (Congo)* was not that there were no published policies. Given the breadth and unspecific nature of the UK detention powers, policies designed to give guidance as to how such powers would be exercised had unsurprisingly been published. The unlawfulness castigated by the members of the Court in *WL (Congo)* arose out of the fact that it had been misleadingly

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64 And in my view, taking other reasonably necessary steps.

65 *WL (Congo)* at §34.

suggested by the Secretary of State that the published policies were being applied whereas in truth a contrary, unpublished policy was being operated. Lord Dyson JSC explained this as follows:

> "Between April 2006 and 9 September 2008, the Secretary of State's published policy on detention of FNPs [66] under her immigration powers was that there was a 'presumption' in favour of release, although detention could be justified in some circumstances. In fact, during this period the Secretary of State applied a quite different unpublished policy which was described as a 'near blanket ban' by the Secretary of State, Ms Jacqui Smith, to the Prime Minister, Gordon Brown, on 19 September 2007 in a document entitled 'Bail Proposal for Foreign National Prisoners' in which she said:
>
> > 'Since April 2006, the BIA [the Border and Immigration Agency] has been applying a near blanket ban on release, regardless of whether removal can be achieved and the level of risk to the public linked to the nature of the FNP's original offence. By currently having no discretion to grant bail, the BIA has to regularly transfer FNPs around the Estate.'"[67]

73. Similarly, *Kambadzi* was not about the lack of a policy. It concerned a breakdown in the system whereby the policy published in the Home Office's manual prescribing periodic reviews of the detention of a person pending deportation was not adhered to. Baroness Hale of Richmond JSC described the unlawfulness arising in the following terms:

> "It is not statute, but the common law, indeed the rule of law itself, which imposes upon the Secretary of State the duty to comply with his own stated policy, unless he has a good reason to depart from it in the particular case at the particular time. Some parts of the policy in question are not directly concerned with the justification and procedure for the detention and have more to do with its quality or conditions. But the whole point of the regular reviews is to ensure that the detention is lawful. That is not surprising. It was held in *Tan Te Lam*, above, that the substantive limits on the power to detain were jurisdictional facts, so the Secretary of State has to be in a position to prove these if need be. He will not be able to do so unless he has kept the case under review. He himself has decided how often this needs to be done. Unless and until he changes his mind, the detainees are entitled to hold him to that. ... In my view, Munby J was right to hold that the reviews were 'fundamental to the propriety of the continuing detention' and 'a necessary prerequisite to the continuing legality of the detention' ..."

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66 "FNPs" were "Foreign National Prisoners" under consideration for detention upon completion of their sentences of imprisonment: *WL (Congo)* at §1.

67 *WL (Congo)* at §5.

74. *WL (Congo)* and *Kambadzi*, properly understood, provide no support for the contention that in the present case, the absence of formulated policies to supplement operation of section 32 of the IO constituted a breach of a public law duty on the Director's part. Those were decisions turning on broad and unspecific detention powers in legislation which is qualitatively different from the legislation we are concerned with. They were also decisions concerning a public law duty not presently engaged, namely, the duty to adhere to a published policy promulgated as supplementing and limiting a broad discretion conferred by statute.

J.4 When a public law duty to publish policies may arise

75. There are, however, helpful statements[68] in the judgment of Lord Dyson JSC in *WL (Congo)* indicating when, as a matter of principle, it may be a public law requirement that a decision-maker should disclose or publish policies as to how a discretion (especially one involving executive detention) is generally to be exercised:

> "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338e. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 , para 26 Lord Steyn said:
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> > 'Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice.'
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> Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision."[69]

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68 Albeit made in the different context of criticising the application of unpublished policies while ostensibly adopting inconsistent published policies.

69 At §§35 and 36.

76. His Lordship added:

> "The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt an exhaustive definition. It is common ground that there is no obligation to publish drafts when a policy is evolving and that there might be compelling reasons not to publish some policies, for example, where national security issues are in play. Nor is it necessary to publish details which are irrelevant to the substance of decisions made pursuant to the policy. What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made."[70]

77. I would respectfully adopt that approach which focuses on the ability of the person affected to make informed and meaningful representations regarding exercise of the power. There is no general duty to publish relevant policies but where the power is conferred in terms capable of giving rise to genuine doubts as to the basis of its exercise and thus preventing or significantly hampering the making of such representations in particular cases, a public law duty may arise requiring the publication or disclosure of relevant criteria or reasons. Where the power involves interference with personal freedom, recognition of such a public law duty is necessary to avoid executive detentions lacking transparency and possibly involving arbitrariness.

J.5 Applied in the present case

78. It is possible that in given circumstances, a public law duty could arise on the aforesaid basis in connection with the exercise of section 32 powers of detention. However, in the present case, the appellant could not have been in any doubt as to why and on what basis he was detained pending possible repatriation to Pakistan. The appellant's history of evading immigration control and repeated immigration offences[71] must have left him in no doubt that he was under detention because he presented an obvious risk as a person likely to abscond and

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70 At §38. See also Lord Walker of Gestingthorpe JSC at §190.

71 Discussed in Section H above.

evade immigration control. The course of events involving his initial request to be returned, followed by his change of mind and CAT claim have been examined above. The criticism which is in my view properly levelled at the Director is that he failed to act with reasonable diligence and expedition and kept the appellant detained for an unreasonably long period, not that he had left the appellant in the dark as to why he was being held in detention. I therefore conclude that the "lack of a policy" ground is not made out.

K. The constitutional arguments

K.1 BOR Art 5(1)

79. The constitutional arguments can be disposed of more briefly. BOR Art 5(1), provides as follows:

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

80. The right which it proclaims mirrors the common law right against arbitrary detention discussed in Section C above.[72] The requirement that any deprivation of the right be on grounds and in accordance with procedures established by law has been interpreted in the jurisprudence of the European Court of Human Rights to encompass requirements which find an echo in the principles relating to transparency and non-arbitrariness discussed above. Thus, in *Al-Nashif v Bulgaria*[73], a case involving an individual held in detention pending deportation, the Strasbourg Court stated:[74]

> "The Court reiterates that the phrase 'in accordance with the law' implies that the legal basis must be 'accessible' and 'foreseeable'. A rule's effects are 'foreseeable' if it is

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72 See eg, *Winterwerp v Netherlands* (1979-80) 2 EHRR 387 at §37.

73 (2003) 36 EHRR 37.

74 In the context of Article 8 of the Convention dealing with right to respect for family life.

> formulated with sufficient precision to enable any individual—if need be with appropriate advice—to regulate his conduct.
>
> In addition, there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention. It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."[75]

81. The content of the BOR Art 5(1) right is therefore, as previously pointed out, no different from the content of the common law right and the appellant's position is not improved by bringing himself within its terms. If one were faced with the argument that the common law freedom from arbitrary detention had in some way been curtailed by statute, it would be important to determine whether a constitutional challenge to such a statute could be mounted on the basis of BOR Art 5(1) or BL Art 28. However, there is no suggestion that the relevant IO provisions have such an effect.

82. In any event, it is clear that by reason of section 11 the appellant cannot bring himself within BOR Art 5(1). Section 11 provides:

> "As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

83. The words "this Ordinance" in section 11 refer of course to the Hong Kong Bill of Rights Ordinance[76] which implements the International Covenant on Civil and Political Rights as applied to Hong Kong and is given constitutional

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75 (2003) 36 EHRR 37 at §119. Another example is *Amuur v France* (1996) 22 EHRR 533 at §50.

76 Cap 383.

status by Article 39[77] of the Basic Law ("BL Art 39"). BOR Art 5(1) is a provision of that Ordinance.

84. It is not disputed that the appellant is a person who does not have "the right to enter and remain in Hong Kong". It follows that if, in exercising the detention powers contained in IO section 32, the Director is "applying legislation governing entry into, stay in and departure from Hong Kong", section 11 precludes reliance by the appellant on BOR Art 5(1).

85. Mr Dykes seeks to argue that section 11 does not apply because, on its true construction, legislation conferring power to detain a person pending a decision on his or her removal and pending removal itself, is not "immigration legislation governing entry into, stay in and departure from Hong Kong". I do not agree. Such powers are inextricably part of the legislative scheme of immigration control which regulates stay in and departure from Hong Kong. They are part of the statutory machinery designed to regulate termination of a person's stay here and to ensure his or her enforced departure where a decision to remove is taken.

86. An argument similar to Mr Dykes' submission was mounted and rejected in *GA and Others v Director of Immigration*[78] in the context of a claim by mandated refugees and a screened-in torture claimant to a right to work. As Chief Justice Ma pointed out, section 11 is concerned with immigration control,

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[77] Article 39: "The provisions of the International Covenant on Civil and Political Rights, ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

[78] Ma CJ, Ribeiro and Tang PJJ, Chan NPJ and Lord Clarke of Stone-cum-Ebony NPJ, FACV 7, 8, 9 & 10/2013 (18 February 2014).

as reflected in Article 154(2) of the Basic Law.[79] The section "is intended to except immigration legislation that deals with each stage of a person's stay in Hong Kong, ... from entry through his or her stay in Hong Kong, to departure."[80] While it was recognized[81] that possible arguments exist as to the precise limits of what is meant by "immigration legislation governing entry into, stay in and departure from Hong Kong", it was held that the power to permit or prohibit working while in Hong Kong was clearly within that phrase. In my view, the same applies to the detention powers under discussion.

K.2 BL Art 28 and BL Art 41

87. The provisions of the Basic Law relied on provide as follows:

> *BL Art 28*
>
> The freedom of the person of Hong Kong residents shall be inviolable.
>
> No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. ...
>
> *BL Art 41*
>
> Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter.[82]

88. As with BOR Art 5(1), the content of the right to personal freedom guaranteed by BL Art 28 is for present purposes no different from the common law right as applied in the preceding paragraphs of this judgment. It is therefore unnecessary further to consider the application of BL28. However, as there was

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79 At §29(2) and (3). BL Article 154(2): "The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions."

80 At §30.

81 At §35.

82 Including BL Art 28.

some discussion at the hearing and in the Courts below regarding the relationship between BL Art 41 and BL Art 28, I will say something on that topic.

89. The appellant is not a Hong Kong resident. He can therefore only bring himself within BL Art 28 if he can rely on BL Art 41. The question which arose was whether BL Art 41 operates to permit such reliance. In particular, the question was whether the words "in accordance with law" in BL Art 41 bring section 11 to bear in a manner which precludes persons who, like the appellant, do not have "the right to enter and remain in Hong Kong", from relying on BL Art 41.

90. The Courts below answered that question positively. HH Judge Leung stated:

> "The qualification is 'in accordance with law'. The availability to non-Hong Kong residents of the protection of the rights contained in Chapter III of the Basic Law is subject to the law in force in Hong Kong. 'Law' must include the immigration reservation to the ICCPR, now reflected in 11 of the HKBORO, which upon the above analysis is consistent with Art.39 of the Basic Law."[83]

91. In the Court of Appeal,[84] citing that Court's earlier decision in *MA & Ors v Director of Immigration*,[85] Fok JA stated:

> "...the phrase 'in accordance with law' in BL41 includes the IO so that the provisions of that ordinance would be relevant in considering the extent of a Basic Law right for a non-resident."

92. I respectfully agree that in the present case, the effect of section 11 is to preclude reliance by the appellant on BL Art 28. However, it is important to be clear why that is so.

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83 At §56, citing *Santosh Thewe & Anor v Director of Immigration* [2000] 1 HKLRD 717 at 721D-722H; and *Gurung Ganga Devi v Director of Immigration*, HCAL 131/2008 (23 September 2009) at §§20-23; 27.

84 Court of Appeal at §63.

85 Stock VP, Kwan and Fok JJA, CACV 44-48/2011 (27 November 2012) at §145.

93. One should at once dispel any notion that the words "in accordance with law" in BL Art 41 mean that it is open to the legislature, simply by passing legislation, to deprive persons other than Hong Kong residents who are present in the HKSAR of Chapter III rights. That would plainly be a wrong reading of BL Art 41. If that had been the Basic Law's intention, BL Art 41 would not have been included at all. The object of BL41 is to extend the Chapter III constitutional guarantees to persons in Hong Kong who are not residents. Such guarantees take effect at the level of the constitution and are in principle not merely in the legislature's gift, to be permitted or excluded at any stage if it sees fit.

94. The reason why section 11 results in excluding the appellant's reliance on BL Art 41 is that, by virtue of BL Art 39, section 11 operates at the constitutional level and qualifies the scope and effect of BL Art 41. BL Art 39 states:

> "The provisions of the International Covenant on Civil and Political Rights, ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

95. It is well established that the ICCPR is implemented through the Hong Kong Bill of Rights Ordinance and that such implementation includes the immigration exception contained in section 11. Thus, in *Gurung Kesh Bahadur v Director of Immigration*,[86] Li CJ (with whom the other members of the Court agreed) stated:

> "The provisions of the International Covenant on Civil and Political Rights (the ICCPR) as applied to Hong Kong were implemented through the Hong Kong Bill of Rights Ordinance (Cap 383), which contains the Hong Kong Bill of Rights (the Bill). That Ordinance effects the incorporation of the ICCPR as applied to Hong Kong into our

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[86] (2002) 5 HKCFAR 480 at §§21-22.

> laws. See *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793, (10 July 2002) para 53, *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 at 455.
>
> The ICCPR as applied to Hong Kong was subject to the reservation, originally made by the United Kingdom, that immigration legislation as regards persons not having the right to enter and remain could continue to apply. It is unnecessary to set out the terms of the reservation in full since it is reflected in s 11 of the Hong Kong Bill of Rights Ordinance."

96. As was pointed out in *Ubamaka*:[87]

> "... in adopting the ICCPR as applied to Hong Kong, Article 39 applied the Covenant subject to the immigration reservation made at the time of the United Kingdom's ratification. ... section 11 is consistent with that reservation. It follows that section 11 has the blessing of Article 39 and cannot be unconstitutional. Moreover, Article 154(2) of the Basic Law expressly authorises the HKSAR Government to 'apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions'."

97. In other words, in giving constitutional status to the Bill of Rights Ordinance including section 11, BL Art 39 gives constitutional status to a specific exception to relevant provisions of the Bill of Rights in relation to persons not having the right to enter and remain in Hong Kong and in respect of immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of such legislation. For the reasons discussed above,[88] that exception precludes resort to the right to liberty and security of person under BOR Art 5(1) by the aforesaid class of persons in relation to the application of the specified categories of immigration legislation. Giving effect to the words "in accordance with law" in BL Art 41, it is necessary to read BL Art 28, which is concerned with freedom of the person in general, as subject to that specific exception provided for by section 11, given constitutional status by BL Art 39.

98. As we have seen, section 11 does not preclude persons who come within its terms from relying on the common law right to personal freedom and

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87 *Ubamaka Edward Wilson v Secretary for Security* (2012) 15 HKCFAR 743 at §95

88 In Section K.1.

to protection against arbitrary arrest or detention. Nor does section 11 preclude such persons from relying on Chapter III and Bill of Rights guarantees in respect of legislation other than "immigration legislation governing entry into, stay in and departure from Hong Kong".

99. It is unclear to what extent, if at all, the words "in accordance with law" in BL Art 41 are capable of taking effect to exclude Chapter III rights in situations other than the section 11 case just discussed. That is a matter which is of no present concern.

L. Damages

100. The tort of false imprisonment is actionable *per se* without proof of loss or damage and entitles the detainee to nominal damages in any event.[89] The question arises as to whether and when breach of a public law duty is such as to make the detention unlawful for the purposes of supporting a claim for substantial damages for false imprisonment.

101. In *Holgate-Mohammed v Duke*,[90] Lord Diplock decided that conduct held to be unlawful on *Wednesbury* principles rendered such conduct unlawful not merely for judicial review purposes, but also for the purpose of founding a cause of action in damages for false imprisonment. But it is clear that not every breach of a public law duty has that result.[91]

102. Breach of a public law duty, at least in relation to interference with the common law right to personal freedom, does not require causation to be

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89 *R (WL (Congo)) v Home Secretary (SC (E))* [2012] 1 AC 245 at §64 per Lord Dyson SC; *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at §74 per Baroness Hale JSC.

90 [1984] 1 AC 437 at 443.

91 *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at §43 and §65.

proved. Thus, in *Kambadzi*, where there was a failure to comply with a public law duty to carry out periodic reviews of a person's detention, it was no defence for the Secretary of State to say that there were good grounds for detaining the appellant anyway.[92]

103. However, when it comes to damages for false imprisonment, causation is important if the detainee is to be awarded more than nominal damages. Thus, in *Kambadzi*, Baroness Hale JSC stated:[93]

> "However, the result of any review, had it been held, cannot be irrelevant to the quantum of damages to which the detainee may be entitled. False imprisonment is a trespass to the person and therefore actionable per se, without proof of loss or damage. But that does not affect the principle that the defendant is only liable to pay substantial damages for the loss and damage which his wrongful act has caused. The amount of compensation to which a person is entitled must be affected by whether he would have suffered the loss and damage had things been done as they should have been done."

104. Breach of the public law duty has the necessary causal connection with the detention and so is capable of constituting tortious unlawfulness if it "bears directly on the discretionary power that the executive is purporting to exercise".[94] Lord Kerr of Tonaghmore JSC put it thus:

> "...The public law error in the present case bore directly on the decision to detain in that it was made without the necessary review of the justification for detention. As the majority in *R (on the application of Lumba) v Secretary of State for the Home Dept* also held, however, causation is relevant to the question of the recoverability of damages. For the reasons that I gave in my judgment in [*WL (Congo)*], I consider that if it can be shown that the claimant would not have been released if a proper review had been carried out, this must have an impact on the quantum of compensation and that nominal damages only will be recoverable."[95]

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92 *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at §54 and §74.

93 At §74. See also Lord Kerr of Tonaghmore JSC at §89.

94 *R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299 at §41 per Lord Hope of Craighead DPSC.

95 *Kambadzi* at §§88 and 89.

105. As we have seen,[96] HH Judge Leung held that there had been no breach of duty and awarded no damages. He indicated, however, that if BOR Art 5(1) had been available, he would have found that that Article had been breached on the basis that the appellant's "lack of a policy" argument succeeded, rendering the detention unlawful. He found that such unlawfulness was causally linked to the appellant's detention and that he would have assessed damages at $30,000. The Judge's hypothetical assessment was thus in respect of the entire six-week period of detention. Neither side has any quarrel with the quantum of that assessment.

106. I have held that the "lack of a policy argument" is not made out and accordingly do not accept that the entire period of detention was unlawful. Instead, I have held that the appellant's detention was excessive in its duration and inconsistent with the 2nd, 3rd and 4th *Hardial Singh* principles. Breach of those public law principles plainly had a direct bearing on the continuation of the appellant's detention since their observance would have resulted in his release some ten days sooner. Such public law unlawfulness therefore constitutes unlawfulness for the purposes of founding a claim for substantive damages for false imprisonment over a period of ten days.

107. Taking the Judge's assessment of $30,000 for the entire period as a base and looking at the position broadly and robustly, I would assess damages for unlawful detention over 10 days in the sum of $10,000 and accordingly allow the appeal. I would also make an order nisi that the Director pay the appellant's costs here and below, with liberty to the parties to lodge written submissions as to costs within 14 days of the date of this judgment if so advised and, in default of such submissions, that the order nisi stand as an order absolute without further order.

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96 In Section J.1 above.

I would also direct that the appellant's own costs be taxed in accordance with the Legal Aid Regulations.

Mr Justice Tang PJ:

108. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Bokhary NPJ:

109. I would allow this appeal to the extent proposed by Mr Justice Ribeiro PJ and for the reasons which he gives. All that I would add is a word on art. 41 of the Basic Law which is to be found in Chapter III thereof. Article 41 provides that "[p]ersons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter".

110. The rights and freedoms of all residents prescribed in Chapter III of the Basic Law are those which are not restricted to *permanent* residents (being the right of abode under art. 24 and the right to vote or stand for election under art. 26) or to indigenous inhabitants of the New Territories (under art. 40 which protects the lawful traditional rights and interests of such inhabitants). Article 39 refers to "Hong Kong residents" without restriction. But I do not propose to say anything about this article in the present context since it operates not by enumerating rights and freedoms but by referring to other instruments that do so.

111. Article 41's obvious purpose is to make Hong Kong a place where human rights are protected for the benefit of everyone within its territory. The Basic Law stands above ordinary law. And whatever else may be the meaning and effect of the phrase "in accordance with law" to be found in art.41, its effect is most emphatically not that non-residents are exposed to deprivation by ordinary law of the constitutional rights and freedoms which are conferred upon all residents by Chapter III. The present case does not call for a full and final

decision on the meaning and effect of the phrase "in accordance with law" to be found in art. 41 and in many other articles of Chapter III. Such a decision is for another day. But it should be said here and now that the meaning and effect of the phrase cannot be to permit the undermining by ordinary law of the fundamental rights and freedoms offered by a law higher than ordinary law. The meaning and effect of the phrase would seem to be to mandate ordinary laws that play their part in delivering the fundamentals offered by a higher law, namely our constitution the Basic Law.

Lord Walker of Gestingthorpe NPJ :

112. I agree with the judgment of Mr Justice Ribeiro PJ.

Chief Justice Ma :

113. The Court unanimously allows the appeal, awards the appellant the sum of HK$10,000.00 by way of damages for false imprisonment and makes the orders as to costs set out in the final paragraph of the judgment of Mr Justice Ribeiro PJ.

(Geoffrey Ma) Chief Justice	(RAV Ribeiro) Permanent Judge	(Robert Tang) Permanent Judge

(Kemal Bokhary) Non-Permanent Judge	(Lord Walker of Gestingthorpe) Non-Permanent Judge

Mr Philip Dykes SC, Mr Hectar Pun and Ms Christine Yu instructed by Yip & Liu and assigned by the Legal Aid Department for the Appellant

Mr Anderson Chow SC and Ms Grace Chow instructed by the Department of Justice for the Respondent