JUSTICE CENTRE | HONG KONG

Case Summary for:

***AKRAM MUHAMMA V. DIRECTOR OF IMMIGRATION AND ANOTHER*[1]**

Court:	Court of First Instance (Hong Kong) (the "**Court**")
Judges:	The Hon Mr. Justice Coleman
Applicant (and Counsel):	Akram Muhamma (Mr Jeffrey Tam and Mr Albert Wan, instructed by Tang, Wong & Chow, for the applicant)
Respondent (and Counsel):	Director of Immigration as 1st putative respondent; and Secretary for Security as 2nd putative respondent (Mr Michael Lok, instructed by the Department of Justice, for the putative Respondents)
Date heard:	January 17, 2023
Date promulgated:	March 21, 2023
Full text:	http://www.hklii.hk/eng/hk/cases/hkcfi/2023/595.html

ABSTRACT: The Applicant is a Pakistani national, and he entered Hong Kong illegally in 2008 and has been overstaying in Hong Kong since then. Since December 19, 2020, the Applicant has been held in immigration detention pending his removal and deportation. He was originally detailed in the Castle Peak Bay Immigration Centre ("**CIC**") but was transferred to the Tai Tam Gap Correctional Institution ("**TTG**") on June 17, 2021. The Applicant viewed the detention treatment in CIC as more favorable than that in TTG, and his repeated requests for transferring back to CIC were rejected.

On November 24, 2022, the Applicant filed a "hybrid" application form for (i) an application for leave to apply for judicial review arising from the difference in detention conditions between TTG and CIC, and (ii) a *habeas corpus* application seeking immediate release from immigration detention.

Both applications were dismissed and the Court handed down reasons for the two applications separately. In this case with respect to the application for leave to apply for judicial review, the Court held that (i) the relevant subsidiary legislation in question enacted within the scope of power of the enabling statute is not subject to judicial review on the ground of irrationality and (ii) the differential treatment on immigration detainees in TTG and CIC did not constitute an unlawful discrimination case, because (A) the TTG detainees and CIC detainees are not comparable in the sense that they differ in terms of security risk profile; and (B) therefore there is no need to get to the question of justification for such difference. For completeness, the Court still considered the justification question after looking to the actual differences in treatment in CIC and TTG, and held that "*the less favorable treatment to TTG detainees is not disproportionate and it does strike a balance between accompanying societal benefits and the incursion into detainees' privacy of liberty*."

Key words:	Judicial review, unequal treatment in immigration detention, invalidation of subsidiary legislation on ground of irrationality, discriminatory treatment and justification

The Justice Centre is grateful for the assistance rendered by Morrison & Foerster on this case summary.

[1] [2023] HKCFI 595; HCAL 1329/2022

SUMMARY:

Facts and Procedural History:

The Applicant is a Pakistani national, and he entered Hong Kong illegally in 2008 and has been overstaying in Hong Kong since then. In 2015, the Director of Immigration (the "**Director**") issued a Removal Order against him under section 19(1)(b) of the Immigration Ordinance (the "**IO**"), and in 2022, the Secretary for Security (the "**Secretary**") issued a Deportation Order against him under section 20(1) of the IO. Since December 19, 2020, the Applicant has been held in immigration detention pending his removal and deportation. He was originally detailed in CIC but was transferred to TTG on June 17, 2021. The Applicant viewed the detention treatment in CIC as more favorable than that in TTG, and his repeated requests for transferring back to CIC were rejected.

On November 24, 2022, the Applicant filed a "hybrid" application form for (i) an application for leave to apply for judicial review arising from the difference in detention conditions between TTG and CIC, and (ii) a usual *habeas corpus* application seeking immediate release from immigration detention. Both cases were heard on January 17, 2023. The Court dismissed both applications, and this judgement sets forth the reasons for dismissing the first application. The main reasons for dismissing the *habeas corpus* application were detailed in the judgement [2023] HKCFI 174.

Issues:

Whether Paragraph 3 of the Immigration (Places of Detention) Order Cap 115B (the "**115B Order**") is Wednesbury unreasonable in that it violates the principle of equality (the "**Unequal Treatment Ground**").

Relatedly, the Court looked into three sub-issues, as raised in Respondents' counsel's arguments to defeat the above systematic challenge:

(1) Can subsidiary legislation (*i.e.*, the 115B Order) be invalidated on ground of irrationality?

(2) Does the legislative scheme produce unlawful inequality?

(3) Is there unjustified differential treatment arising from the detention conditions in TTG and CIC?

Judgment:

The Court dismissed the application for leave to apply for judicial review. (The *habeas corpus* application was also dismissed in the Reasons for Decision dated January 31, 2023, see [2023] HKCFI 174.)

As to the sub-issues, the Court held that:

(1) Subsidiary legislation enacted within the scope of power of the enabling statute is not subject to judicial review on the ground of irrationality. (para 79)

(2) The Court did not agree that the legislative scheme (the 115B Order and the related legislation) has sufficient in-built flexibility to preempt the argument that the legislative scheme could produce differential treatment on immigration detainees and other persons in the custody of a prison. (paras 87 and 89)

(3) This case did not constitute an unlawful discrimination case.

Reasons for Judgment:

(1) Can subsidiary legislation (*i.e.*, the 115B Order) be invalidated on ground of irrationality?

Section 35(1) of the IO empowers the Secretary, by order, to authorize immigration detainees to be detained in such places, and the 115B Order was enacted under section 35(1). Paragraph 2 of the 115B Order provides the places specified in Schedules 1, 2 and 3 shall be places for immigration detention. TTG can be found in Schedule 1 (being sites and buildings set apart for prisons but also authorized by law as a place for immigration detention), and CIC is listed in Schedule 3 (as a dedicated immigration detention centre).

Schedule 1 to the Immigration (Treatment of Detainees) Order Cap 115E (the "**115E Order**") sets out the treatment of detainees, while CIC is the only place that is listed in Schedule 2 to the 115E Order.

The Applicant and his counsel argued that paragraph 3 as the source of differential treatment between TTG and CIC because of its irrationality, and sought an order of *certiorari* to quash that paragraph. However, the Court pointed out that, this application gave rise to a misunderstanding because paragraph 3 of the 115B Order mainly operates to "*provide prisoners awaiting trial with privileges which are not enjoyed by convicted criminals serving their sentences*," and the term "prisoners" includes "*not only convicted criminals serving their sentences but also widely covers those lawfully confined in places which are set apart for the purposes of prisons*." (paras 29, 32)

As such, the Court held that quashing paragraph 3 of 115B would work to the opposite effect by removing such privileges and subjecting those "detainees" held in prisons (such as TTG) who are not convicted criminals to the general rules applicable to convicted criminals, and hence the Court understood that, to make the Applicant's case intelligible, the actual relief sought by the Applicant should be to "*remove TTG from the list of places set apart for prisons purposes in Cap 234B, and expressly to list it under Schedule 1, 2 or 3 of the 115B Order and in 115E Order*" to bring TTG on par with CIC in terms of treatment to immigration detainees.

The Court noted that this case was firmly framed as a conventional administrative law review, rather than a constitutional review on the right of equality and non-discrimination, perhaps to circumvent the difficulties of the Applicant being a non-Hong Kong resident and the immigration reservation under section 11 of Bill of Rights Ordinance. However, given the

Applicant was not challenging a policy (as in *QT v Director of Immigration*[2] *("**QT**")*) adopted by the Secretary/the Director in managing TTG, nor the primary legislation enabling the subsidiary legislation, the Court was of the view that this case involves the question whether the Court can, by invoking its judicial review powers, invalidate the subsidiary legislation on the ground of irrationality. (paras 67 and 69)

The Court held that the position in Hong Kong is clear that subsidiary legislation enacted within the scope of power of the enabling statute is not subject to judicial review on the ground of irrationality. (para 79)

Citing the Court of Final Appeal (the "**CFA**")'s decision in *Noise Control Authority v Step In Ltd*[3], the Court noted the leading judgement from the case that, "*in earlier times the prevailing position was that a by-law must be certain and reasonable for it to be valid. But the law has gradually developed such that now reasonableness of the by-law is subsidiary to be question of whether the by-law was made within the powers of the enabling statute as intended by the legislature.*" In *The Attorney General v Tsang Kwok-Kuen*[4], it is held that "*the principle that unreasonableness of subsidiary legislation on its own is an insufficient ground for invalidation. Rather it is only a factor in assessing the ultimate question of whether the subsidiary legislation is ultra vires the enabling legislation.*" (para 72, 78)

The Court noted that the Applicant's counsel claimed that unreasonableness is a subset of *ultra vires*, but he failed to make clear what is meant by unreasonableness is part and parcel of the *ultra vires* doctrine. The Court went on to say, if the Applicant's counsel meant to say that the 115B Order is outside of the scope of power of its enabling statute on the basis that no legislature could have intended to enable the making of subsidiary legislation which could operate to produce unequal treatment between TTG and CIC detainees, he did not sufficiently develop this argument; and he did not attempt to construe the scope of powers of section 35 of the IO (or the Prisons Ordinance Cap 234) that authorize the power to designate TTG as a place for immigration detention.

In conclusion, the Court held that the detention treatment in TTG and CIC do not violate the principle of equality and there is no unreasonableness in the legislative scheme to make the scheme *ultra vires*. (para 82)

(2) Does the legislative scheme produce unlawful inequality?

The Court does not agree that the legislative scheme (the 115B Order and the related legislation) has sufficient in-built flexibility to pre-empt the argument that the legislative scheme could produce differential treatment on immigration detainees and other persons in the custody of a prison. (paras 87, 89)

The Respondents' counsel submitted that the existence of any actual difference (which does not arise as a matter of design) does not mean that the system violates the equality principle,

[2] (2018) 21 HKCFAR 324
[3] (2005) 8 HKCFA 113
[4] [1971] HKLR 266

and that the legislative scheme has in-built statutory flexibility to suit the needs of treating different immigration detainees differently from other persons in the custody of a prison.

However, the Court disagreed and noted that the fact that the Correctional Service Department (the "**CSD**"), which manages TTG, has the power to refrain from exercise of powers, would not be a sufficient answer to a systemic challenge that the legislative scheme has produced or is capable of producing unequal treatment for immigration detainees in TTG and CIC.

(3) Discriminatory treatment and justification

The Court is of the view that this is not an unlawful discrimination case, because (i) TTG detainees and CIC detainees are not comparable in the sense that they differ in terms of security risk profile; and (ii) with the conclusion on the comparable question in (i) above, no justification question arises. Yet, for completeness, the Court still considered the justification question and reached the view that the "*proper standard of review should be higher threshold of manifestly without reasonable foundation*," and that "*the less favorable treatment to TTG detainees is not disproportionate and it does strike a balance between accompanying societal benefits and the incursion into detainees' privacy of liberty*." (paras 121, 122)

The Court noted that, as identified in *QT*, there are two main issues in unlawful discrimination cases: (1) first, whether there is discriminatory treatment at all, and (2) if so, whether the discriminatory treatment can be justified.

Is there discriminatory treatment? Are the immigration detainees in TTG and CIC comparable?

The Court went on to note that the first question turns on whether the target challenged falls within any of the three recognized categories of discrimination as summarized in para 32 in *QT*, being "*(1) like is not being treated as like in that complainant is receiving treatment which is unfavorable when compared with treatment given to persons in "relatively similar situations," (2) a complianant disadvantageously receives the same treatment as persons in significantly different situations; and (3) the application of an ostensibly neutral criterion operates to the significant prejudice of a particular group.*"

The Applicant's counsel relied on the first category, and the Respondents' counsel argued that the TTG detainees and CIC detainees are not in a comparable or analogous situation such that like treatment is not required. The two groups are different in that TTG detainees are assessed by the Director to be posing a higher security risk, and that as of December 15, 2022 (while the figure for CIC was submitted to be 62%), all immigration detainees held in TTG were convicted criminals discharged from prison, and some have been sentenced for more than 10 years for committing serious crimes, such as murder and rape. The Respondents' counsel cited *Re Morrison and another's Application*[5] ("***Re Morrison***") for the proposition that prisoners or detainees with different security classification should not be considered as comparators, and the different classification would warrant a difference in their detention conditions; and in *R (on the application of Rangwani) v Secretary of State for Home Department*[6], the authority

[5] [1998] NI 68

[6] [2011] EWHC 516

is entitled to take account of a detainee's security risk profile in determining the detention conditions imposed.

The Court agreed with Respondents' counsel that the TTG detainees are not comparable with, or not in a relevantly similar situation to, the CIC detainees in the context of the eight areas of actual differential treatment relied upon by the Applicant's counsel. The Court held that, as noted in *Re Morrison*, "*it must be wrong that immigration detainees must not be distinguished from each other or be subject to different detention rules by reference to their security risk profile*," and "*security risk profile is a matter traditionally recognized by the Court as being well within the Secretary/Director's expertise*," see *Simona Mundai v Director of Immigration*[7] at para 29. The Court also noted that the position would be different if the distinguishing feature is, as in the *QT* case, marital status or sexual orientation which matters the authority will be in no better position than the applicants in ascertaining the factual position. The Secretary/Director's affidavit evidence also shows that there is a policy intent to centralize to TTG those detainees posing a higher security risk, and this policy was unchallenged on ground of reasonableness or certainty, nor in its general execution or in relation to the Applicant's specific case.

Whether the discriminatory treatment can be justified?

The Court does not need to consider the justification question since the Court is of the view that TTG detainees and CIC detainees are not comparable. Yet, for completeness, the Court considered it and held that the differential treatment to TTG detainees "*is not disproportionate and it does strike a balance between accompanying societal benefits and the incursion into detainees' privacy or liberty.*"

The Court noted, as CFA noted in *QT*, the proportionality concepts developed for scrutinizing incursions made into constitutionally protected rights are equally applicable in deciding whether differential treatment could be justified in a judicial review context. The Court would consider whether the differential treatment (1) pursues a legitimate aim, (2) is rationally connected to the legitimate aim, (3) is no more than necessary to accomplish the legitimate aim, and (4) strikes a reasonable balance between societal benefits of the encroachment on the one hand, and the inroads into constitutionally protected rights of the individual on the other.

The Applicant's counsel raised eight main areas of differential treatment of TTG and CIC detainees that are summarized as follows. The Court noted that only those arising from the powers granted by the Prison Rules (Cap. 234 sub. leg. A), as mentioned in paragraph 3 of the 115B Order[8], and as such, only item 1 (body cavity search), item 2 (urine examination),

[7] [2020] 2 HKLRD 1205

[8] Paragraph 3 of the 115B Order provides that "*[a] person detained in any place set out in Schedule 1 [including TTG] shall receive the same treatment as that which is accorded to a person committed to prison for safe custody in any of the circumstances specified in rule 188(1) of the Prison Rules (Cap. 234 sub. leg. A) and, mutatus mutandis, rules 189 to 207 (inclusive) of the Prison Rules (Cap. 234 sub. leg. A) shall apply to him*."

item 3 (the stopping and reading of letters), item 7 (disciplinary actions) and item 8 (removal from association) are relevant to the challenge of the legislative regime.

	Items of Differential Treatment	***TTG***	***CIC***
1.	Body cavity search	The power for such search is provided in Rule 9(1A) of the Prison Rules. Prior to admission to the institution, TTG detainees may be subject to a search in their rectum, nostrils, ears and other external orifice. X-Ray body scan has been adopted as an alternative to replace the manual rectal search.	Such power is not to be found in Schedule 1 to the 115E Order, nor is such practice adopted in CIC.
2.	Urine examination	Such power is provided in Rule 34A of the Prison Rules. TTG detainees may be required to submit a urine specimen for examination to see if prohibited drugs could be detected.	Such power is not to be found in Schedule 1 to the 115E Order, nor is such practice adopted in CIC.
3.	Letters	Such power is provided under Rule 47A of the Prison Rules. Inward and outward letters may be opened, read, searched for articles which may pose a threat to security or order and discipline in the prison, or be stopped for specified reasons.	In CIC, letters will only be opened and searched for unauthorized articles, but not read or stopped.
4.	Telephone calls	Such practice is not grounded in the Prison Rules but falls within the Government's initiative/policy to build TTG as the first generation "smart prison". Telephone conversations of TTG detainees are recorded in a system known as the "Integrated Intelligent Communication System" and retained for 31 days. The system can also detect sensitive keywords during phone calls and will immediately bring them to the CSD staff's attention.	Telephone conversations in CIC are monitored by staff in CIC but are not recorded.

	Items of Differential Treatment	*TTG*	*CIC*
5.	Social visits	This practice is not grounded in any Prison Rules. In TTG, conversation between visitors and detainees will be both monitored by CSD staff and also recorded.	In CIC, there will be a staff member at the end of the visit room to observe detainees and their conversation with visitors but the conversations will not be recorded.
6.	CCTV	More extensive coverage in TTG covering day and night accommodation including cells, dormitories and hospital wards are under full CCTV coverage. The toilets are also covered by CCTV but its system is programmed to block out the urinal, and thus the private part of a detainee. There is no CCTV coverage in the bathroom. As part of the Government's initiative to build TTG as the first generation "smart prison", the CCTV system in TTG is equipped with multiple high-tech functions such as facial recognition and body temperature detection.	In CIC, there is no CCTV coverage in toilets, shower rooms, dormitories, special units on detention floors and all wards in the sickbay, but there is CCTV coverage in dayrooms, exercise yards, recreation rooms, sally ports, corridors and lobby on detention floors, isolation wards and protected rooms in sickbay, main gate, visit booths and interview rooms of visit room and waiting areas in reception office.
7.	Disciplinary actions	Such power is provided for in Rules 61 and 63 of the Prison Rules: There are more categories of offences against institutional discipline and heavier punishment for breaches in TTG: 17 categories of offences against institutional discipline the breaching of which could attract 28 days of separate confinement as punishment. But Rule 63 of the Prison Rules also provides for a mechanism for TTG detainees to appeal against punishments imposed on them.	Such power is provided for in Rule 13(1) of the 115E Order: In CIC: there are 5 categories of offences the breaching of which attract 7 days of separate confinement. No equivalent appeal mechanism (as for Rule 63 of the Prison Rules applicable to TTG) in CIC.

	Items of Differential Treatment	*TTG*	*CIC*
8.	Removal from association	Such power is provided for in Rule 68B of the Prison Rules. A TTG detainee may be so removed for initially not more than 72 hours and subsequently not more than 1 month and from month to month if CSD has reasonable grounds to do so.	Such power is provided for in Rule 13(2) of the 115E Order. Maximum period of separate confinement in CIC is 7 days

The Court reached its conclusion that the differential treatment on TTG detainees is not disproportionate after considering the following:

(1) There was no legal challenge to the treatment of TTG detainees *per se*.

(2) The differences in treatment relating in telephone calls, letters and social visits are not substantial. They are subject to monitoring in both TTG and CIC.

(3) For CCTV arrangements, the difference turns on the coverage of CCTV rather than its existence. The Court does not think the difference is substantial as the CCTV system in TTG also blurs the private parts of detainees.

(4) Disciplinary action and punishments are stricter in TTG, and the difference in the maximum period of separate confinement – 7 days as opposed to 28 days – may be substantial, but this is to some extent alleviated by the existence of a statutory appeal mechanism in TTG to safeguard against arbitrary punishment.

(5) Body cavity search is conducted by X-Ray and thus the intrusion into bodily integrity has been minimized. For urine examination, it does not seem to be a substantial inroad into a detainee's privacy or liberty in the detention setting.

(6) The current inconsistency between treatment of TTG detainees and of CIC detainees is temporary and the Court understood that the Hong Kong government would soon amend the 115E Order to confer on the Department of Immigration the powers relating to body cavity search, urine examination and disciplinary actions and punishment in the first half of 2023.

Other Considerations:

The Court also summarized the background on CIC and described the history of the recommissioning of TTG and the policy to concentrate detainees with higher security risks in TTG. CIC commenced operation in 2005, and it was the first institution set up exclusively to house immigration detainees. The legislative scheme as applicable to TTG now was identical to what was applicable to CIC before 2010 when the management of CIC was transferred from

the CSD to the Department of Immigration. TTG was chosen as the suitable institution to provide the extra capacity to house immigration detainees when CIC was approaching its full capacity in 2019.

The Court noted that "*the treatment of immigration detainees in TTG falls within the Secretary/Director's wide imperative of immigration controls and the designation of TTG as a prison facility under the management of CSD obviously involve man-power consideration as the historical background has reflected.*"

Legal Provisions considered:

1. Sections 19(1)(b), 20(1) and 35(1) of the IO: https://www.elegislation.gov.hk/hk/cap115

2. Section 11 of Bill of Rights Ordinance: https://www.elegislation.gov.hk/hk/cap383

   "11. Immigration legislation

   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."

3. Paragraph 3 of 115B Order:
   https://www.elegislation.gov.hk/hk/cap115B!en?INDEX_CS=N

   "*3. Application of Prison Rules*

   A person detained in any place set out in Schedule 1 shall receive the same treatment as that which is accorded to a person committed to prison for safe custody in any of the circumstances specified in rule 188(1) of the Prison Rules (Cap. 234 sub. leg. A) and, mutatus mutandis, rules 189 to 207 (inclusive) of the Prison Rules (Cap. 234 sub. leg. A) shall apply to him."

4. Paragraph 2, Schedules 1, 2 and 3 to the 115B Order:
   https://www.elegislation.gov.hk/hk/cap115B!en?INDEX_CS=N

5. Schedules 1 and 2 to the 115E Order: https://www.elegislation.gov.hk/hk/cap115E

Key Cases cited:

1. *Noise Control Authority v Step In Ltd*[9] (regarding whether a by-law could be invalidated by uncertainty or unreasonableness.)
   http://www.hklii.hk/eng/hk/cases/hkcfa/2005/20.html

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[9] (2005) 8 HKCFA 113

2. *QT v Director of Immigration*[10] (regarding (i) that the very wide powers granted to the Director in immigration controls are nonetheless still subject to the principle of equality in their exercise, and the principle of equality is an important aspect of rationality; (ii) at §§34-35, two main issues in unlawful discrimination cases: (1) first, whether there is discriminatory treatment at all (whereby the context of the question is crucial (at §45)), and (2) if so, whether the discriminatory treatment can be justified; and (iii) at §§84-87, that the proportionality concepts developed for scrutinizing incursions made into constitutionally protected rights are equally applicable in deciding whether differential treatment could be justified in the judicial review context.)
http://www.hklii.hk/eng/hk/cases/hkcfa/2018/28.html

3. *R (on the application of Rangwani) v Secretary of State for Home Department*[11] at §§54-58 (regarding that the authority is to entitled to take account of a detainee's security risk profile in determining the detention conditions imposed.)
https://www.refworld.org/cases,GBR_HC_QB,4d9edb922.html

4. *Re Morrison and another's Application*[12] (regarding that prisoners or detainees with different security classification should not be considered as comparators, and the different classification would warrant a difference in their detention conditions.)

5. *Simona Mundai v Director of Immigration*[13] at para 29. (regarding that security risk profile is a matter traditionally recognized by the Court.)
https://vlex.hk/vid/simona-mundia-v-director-851831496

6. *The Attorney General v Tsang Kwok-Kuen*[14] (regarding the validity of a regulation – subsidiary legislation enacted under the Road Traffic Ordinance.)
http://www.hklii.hk/eng/hk/cases/hkca/1971/9.html

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[10] (2018) 21 HKCFAR 324
[11] [2011] EWHC 516
[12] [1998] NI 68
[13] [2020] 2 HKLRD 1205
[14] [1971] HKLR 266