

Case Summary for:
HASHIMI HABIB HALIM v DIRECTOR OF IMMIGRATION¹

| | |
|---|---|
| Court: | Court of First Instance |
| Judges: | Hon Saunders J |
| Applicant (and Counsel): | Hashimi Habib Halim (Wilson K S Chan (instructed by S Y Fung)) |
| Respondent (and Counsel): | Director of Immigration (Bernard Man (instructed by the Department of Justice)) |
| Date heard: | 8, 18 April, 7, 8 August and 9 October 2008 |
| Date promulgated: | 15 October 2008 |
| Full text: | https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2008/885.html |
| <p>ABSTRACT: The Applicant was arrested for seven counts of criminal offences during his stay in Hong Kong in 2000. After serving his sentence, he was detained pending the issue of a removal order. In November 2007, the Applicant filed a <i>habeas corpus</i> application. Before the hearings were completed, the Court of Appeal (the “CA”) intervened by its decision in <i>A (Torture Claimant)</i>, according to which the Director of Immigration’s (the “Director”) power to detain under s.32 of the Immigration Ordinance (Cap.115) (the “Ordinance”) was unlawful as being contrary to Article 5 of the Hong Kong Bill of Rights (the “BOR”).²</p> <p>After the decision, the Director took immediate steps to remedy, and the Applicant added an argument based on the <i>A (Torture Claimant)</i> judgment. The Court examined the remedies the Director had taken after the decision and concluded that the policy the Director had adopted was not sufficiently certain as to the circumstances under which the Director might exercise his power to detain, and therefore infringed Article 5 of the BOR. Accordingly, the Applicant was being unlawfully detained.</p> | |
| Key words: | <i>habeas corpus</i> , unlawful detention, Hong Kong Bill of Rights, Ordinance of Immigration, lawful policy, accessibility |

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

¹ [2008] HKCFI 885; Also cited as HCAL 139/2007

² The Hong Kong Bill of Rights refers to Part II of the Hong Kong Bill of Rights Ordinance (Cap. 383).

SUMMARY:

Facts and Procedural History:

The Applicant claimed to be a Bangladeshi citizen. He entered Hong Kong on 19 October 2000 and was permitted to remain in Hong Kong until 2 November 2000. On 28 October 2000, the Applicant caused some tourists to fall unconscious using packets of drug-laced juice. He was soon arrested and ultimately charged with three accounts on administering drugs, and three accounts of theft. On 5 October 2001, the Applicant punched a Correctional Services Department (the “CSD”) officer when he was on remand prior to the trial. He was convicted and sentenced to eight years for the first six counts and nine months for the assault on the CSD officer, with six months running consecutively to the eight-year term.

On 6 May 2002, the Director served a “Notice of Consideration of Deportation” informing the Applicant that he was being considered to be deported to Bangladesh. No evidence indicated that the Applicant was informed in any way of any policy adopted by the Director in determining whether to issue a detention order at that time.

On 20 December 2006, the Applicant was released from the prison. On the same day, he was detained pursuant to s.32(2A)(a) of the Ordinance pending the Director’s decision on the issue of a removal order. The Applicant’s detention was extended for a 21-day period and a further 21-day period to 13 February 2007 pursuant to s.32(2A)(b) and s.32(2A)(c) of the Ordinance respectively.

On 13 February 2007, a removal order was issued against the Applicant. On the same day, the Applicant was detained pending removal pursuant to s.32(3A) of the Ordinance. No evidence showed that a deportation order was ever made.

In November 2007, the Applicant sought to quash the Director’s decision to detain the Applicant pending his removal from Hong Kong by judicial review proceedings and sought a writ of *habeas corpus* to be released from detention. Before the hearings of the Applicant’s case were completed, on 18 July 2008, the CA intervened by its decision in *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752. In the decision, the exercise of power by the Director under s.32 of the Ordinance was unlawful being contrary to Article 5 of the BOR, as no policy was in place to provide the manner in which the power of detention existed or was made accessible to persons affected by the exercise of such a power.

After the decision in *A (Torture Claimant)*, the Director took steps to remedy. To make the policy accessible, certain notices, which included “Notice of Detention Authority” (“**Notice on Authority**”) and “Notice on Request for Release on Recognizance” (“**Notice on Recognizance**”), were placed at noticeable locations inside the various detention centers. The Applicant’s case was reviewed again, and the Applicant was given two documents entitled “Detailed Ground(s) for Detention” and “Review of Detention” after the review.

On the other hand, in light of the *A (Torture Claimant)* decision, the Applicant sought to amend Form 86A to add an argument that the detention of the Applicant since 13 February 2007 was and had been unlawful as it was contrary to Article 5 of the BOR. Leave for the amendment was granted. On 9 October 2008, the Applicant's case resumed with the argument confined to the issue in relation to the *A (Torture Claimant)* decision.

Issues:

The Court summarized the relevant propositions in *A (Torture Claimant)*, which include:

- (1) the power to detain pending removal under s.32 of the Ordinance is in principle exercisable as long as the Secretary of Security intends to remove the person at the earliest possible moment, and it is not apparent to him that the person's removal within a reasonable time would be impossible;
- (2) s.32 infringes Article 5 of the BOR, as the grounds and procedure for detention are not sufficiently certain and accessible, and there are no published policies as to the circumstances under which the s.32 power would be exercised;
- (3) a clear and lawful policy would ensure that the Director would have considered all relevant circumstances when deciding whether or not to detain; and
- (4) the availability of such grounds would enable an applicant to know how best to ensure that he is not detained.

With this in mind, the Court needed to decide whether or not the detention of the Applicant was lawful in terms of the *A (Torture Claimant)* decision.

Judgment:

The Court held that Article 5(1) of the BOR had been infringed due to the absence of a sufficiently certain policy as to the circumstances under which the Director might exercise his power to detain under s.32 of the Ordinance. Accordingly, the Applicant had been currently unlawfully detained.

Reasons for Judgment:

Sub-issue 1: whether an originally unlawful detention could be subsequently remedied

The Court held that in respect of an application for *habeas corpus*, what it was concerned with was the lawfulness of an applicant's *current* detention rather than what might have happened in the past. Therefore, the Director could take steps to remedy any defect in the detention of the Applicant following the *A (Torture Claimant)* decision; if those steps were lawfully effective, the original unlawful detention was irrelevant. (*paras 29, 30*)

Sub-issue 2: whether the policy was lawful

The Director argued that the Notice on Authority, the Notice on Recognizance, and the documents comprising his decisions which were served on the Applicant, constituted a complete policy accessible to a person who was liable to be detained. (*para 34*)

The Court found that the above documents did not comprise a complete policy. To begin with, the Notice on Authority merely stated the relevant sections of the Ordinance, period of detention, authority which might order the detention and the purpose of detention. This information did not comprise a policy by which the Director might exercise the discretion under s.32 of the Ordinance. (*paras 35 to 36*)

The Notice on Recognizance also failed to establish a complete policy. For a policy to be complete, it must meet the “*requirement that the law should enable those affected by reasonably to foresee the consequences of their actions*”. First, the Director could not rely on documents that recorded or provided reason for the detention as a document of policy, because a policy must be in place and be accessible *before* the making of a decision. Second, the Notice on Recognizance was at best a policy for considering an application for release on recognizance under s.36 of the Ordinance, rather than a policy for considering whether a person should be detained pending removal. Third, even if it was a policy for considering whether a person should be detained pending removal, it did not provide any basis on which a potential detainee might be given any consideration to release. In exercising the discretion, the Director must at the outset consider the prospect that the person might be released to the community instead of being detained. However, the policy at issue neither provided any guidance to the decision maker on how to approach that aspect of decision, nor enabled the potential detainee to know what matters to raise to achieve immediate release. Fourth, even if the Notice on Recognizance was sufficient to be a policy for the purpose of the detention decision, it was deficient for the same reason as stated in the third point above for failing to consider any circumstance on which a person might be immediately released. Fifth, the Legislative Council Paper does not assist the Director’s position as the Director failed to carefully examine what an appropriate policy should comprise. (*paras 38 to 48*)

Sub-issue 3: what constituted a complete policy

The Applicant argued that using “*including, inter alia*” in the alleged statement of policy showed that the Director had taken into account factors that were not known to the Applicant, and therefore the policy was incomplete. (*para 49*)

The Court rejected this argument and made the following observations: first, individual merits of a case might be considered in appropriate circumstances and might raise a factor which was not specified in the policy; second, a policy must be flexible enough, especially when such policy need to deal with a variety of circumstances; third, what was important was that the detainee must be informed of all the grounds that the Director had relied on; fourth, use of expression “*including, inter alia*” or “*main reasons*” in a policy statement created a plain danger of uncertainty, and a satisfactory way in which unknown or case-specific factors could be taken into account might be that “*there are no statutory criteria for detention, and each case must be considered on its individual merits*” (quoting from *N (Kenya)*). (*paras 50 to 56*)

Sub-issue 4: was the policy accessible and when it must be accessible

The Court held that the issue of accessibility should be restricted to the Applicant's particular factual case. In the Applicant's case, the alleged policy statements were posted in the day rooms of various detention centers in 14 different languages including Chinese and English; it was accessible to anyone who chose to read them. On this basis, the Court was satisfied that the policy, though incomplete, was properly accessible to the Applicant. (*paras 58 to 61*)

In terms of when the policy must be made accessible, the Court held that a person who might be affected by the policy should have ample time to access the policy and to foresee the consequences of his actions. In the Applicant's case, the Applicant must be informed of the policy prior to the detention decision, so that the Applicant could know what matters to raise to the appropriate official, who might then properly weigh in the balance all appropriate factors. (*paras 62 to 70*)

The Court further held that the length of time available would depend on different circumstances. In the Applicant's case, the notices containing the alleged policy were posted on 18 July 2008, and the Applicant received the Director's decision on or around 1 August 2008. The Court was satisfied that sufficient time had elapsed to enable the Applicant to inform the Director of any matters that the Director should have taken into account. (*paras 71 to 76*)

Other Considerations:

This case demonstrates how the higher court may intervene an ongoing case by its decision on pertinent issues. The central issue of the hearing was originally whether the Applicant's continued detention was in breach of the *Hardial Singh* principles. Because of the *A (Torture Claimant)* decision, the Court decided (and the parties agreed) to determine on the lawful detention issue first, and only if the Court found it a lawful detention, the issue of *Hardial Singh* principles will arise. In other words, the *A (Torture Claimant)* decision provides the Applicant with an additional layer of protection by requiring the Court to examine the lawfulness of the Applicant's continued detention from the BOR aspect. Therefore, it is important to keep a close eye on the most recent case law development of relevant legal issues. (*paras 3, 11*)

Legal Provisions considered:

1. The Ordinance: sections 19(1)(b), 32(2A)(a), 32(2A)(b), 32(2A)(c), 32(3A), 36
<https://www.elegislation.gov.hk/hk/cap115>
2. BOR: Article 5
https://www.elegislation.gov.hk/hk/cap383@1998-11-05T00:00:00?xpid=ID_1438403137079_001

Key Cases cited:

1. *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 (Article 5 of the BOR requires that the grounds and procedure for detention should be sufficiently certain (or

precise) and accessible. This can be made by a policy (or legislation) and accessible by publication. A clear and lawful policy enables the Director to consider all relevant circumstances and that the decision will not be arbitrary and an applicant to know how to ensure that s/he is not detained. There were no such certain and accessible grounds and procedure for the exercise of the power to detain under s. 32 of the Ordinance, which was contrary to the requirements under Article 5 of the BOR and was unlawful)

<https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkca/2008/278.html>

2. *N (Kenya) v Secretary for State for Home Department* [2004] INLR 612 (provided a good example of what a good policy statement constitutes. The key elements of a good policy should include (i) a presumption in favour of temporary admission or release, (ii) strong grounds to believe that a person will not comply with the conditions of temporary admission or release, (iii) all reasonable alternatives to detention should be considered, (iv) a list of factors that must be taken into account when considering detention, and (v) each case must be considered on its own merits.)

[https://www.bailii.org/cgi-](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2004/1094.html&query=(N)+AND+((Kenya)))

[bin/format.cgi?doc=/ew/cases/EWCA/Civ/2004/1094.html&query=\(N\)+AND+\(\(Kenya\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2004/1094.html&query=(N)+AND+((Kenya)))

3. *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 (the law must be sufficiently flexible, especially where it needs to deal with a variety of substances)

<https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfa/2007/52.html>

4. *Sunday Times v United Kingdom* [1979] 2 EHRR 245 (the law should enable a person affected to foresee the consequences of his or her actions)

[https://www.bailii.org/cgi-](https://www.bailii.org/cgi-bin/format.cgi?doc=/eu/cases/ECHR/1979/1.html&query=(Sunday)+AND+(Times))

[bin/format.cgi?doc=/eu/cases/ECHR/1979/1.html&query=\(Sunday\)+AND+\(Times\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/eu/cases/ECHR/1979/1.html&query=(Sunday)+AND+(Times))