

**Case Summary for:**  
**MIR MOAZZAM v. SECRETARY FOR JUSTICE SUED FOR AND ON BEHALF OF DIRECTOR OF IMMIGRATION**<sup>1</sup>

<b>Court:</b>	The District Court
<b>Judges:</b>	His Honour Judge Andrew Li in Chambers
<b>Applicant (and Counsel):</b>	Mir Moazzam; Subhan; Rana Shahzad Ahmad; Ahmed Zaheer; Dhiman Jasvir (Mr. Lai Man Chun Anthony and Mr. Lau Kam Lun of M.C.A. Lai & Co)
<b>Respondent (and Counsel):</b>	Secretary for Justice on behalf of Hong Kong SAR Government (Mr. Stanley Ng (instructed by the Department of Justice))
<b>Date heard:</b>	22 July and 3 August 2016
<b>Date promulgated:</b>	24 August 2016
<b>Full text:</b>	<a href="http://www.hklii.hk/eng/hk/cases/hkdc/2016/1007.html">http://www.hklii.hk/eng/hk/cases/hkdc/2016/1007.html</a>
<p><b>ABSTRACT:</b> This is a bundle trial of five cases. The Pre-trial Review (“PTR”) hearing on 22 July 2016 was adjourned. The Court applied relevant legal principles regarding wasted costs order and found that the sole reason for adjourning the hearing had been the Applicant’s solicitors’ failure in preparing the trial bundles on time. The Court issued a wasted costs order.</p>	
<b>Key words:</b>	Wasted costs order; case management; non-refoulement claim; damages claim for alleged unlawful detention

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

<sup>1</sup> DCCJ 4591/2014; DCCJ 4751/2014; DCCJ 327/2015; DCCJ 341/2015; DCCJ 1616/2015.

## SUMMARY:

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### Facts and Procedural History:

The five cases aforesaid were all non-refoulement claims brought under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “**CAT**”). The Applicants, represented by Messrs M.C.A. Lai & Co (“**MCAL**”), were claiming damages for unlawful detention against the Respondent.

To save resources and time, the Court had decided to consolidate and handle these cases by “batch trials” with monthly Case Management Conferences (“**CMCs**”) from the end of February 2016 onwards to put cases into separate “batches” for the purpose of conducting PTR and trials.

A CMC for the above cases was held on 23 March 2016<sup>2</sup>. The Court noted that all the Applicants in the current five cases were legally aided. The Court made an order that the Applicant in each case shall prepare the trial bundles in accordance with Practice Directions 5.2 and 5.6 and to lodge the same with the Court and serve them on the Respondent by 4:00 pm on or before 15 July 2016. The PTR hearing was fixed on 22 July 2016 at 9:30 am.

However, MCAL only served on the Department of Justice (the “**DoJ**”) and lodged with the Court the trial bundles in respect of DCCJ 4751/2014 and DCCJ 341/2015 on 19 July 2016, followed by the trial bundles in respect of DCCJ 327/2015 and DCCJ 1616/2015 on 21 July 2016 (i.e., the evening before the PTR). MCAL had neither served on the DoJ nor lodged with the Court any trial bundle in respect of DCCJ 4591/2014 on or before 22 July 2016.

The PTR scheduled on 22 July 2016 could not proceed and was adjourned to 3 August 2016 for the following reasons: (i) MCAL had failed to lodge and serve the respective trial bundles on or before 15 July 2016; (ii) duplicated bundles were lodged with the Court; and (iii) the trial bundles were not compiled pursuant to the aforementioned practice directions. While the Court was prepared to put up with technical defects (e.g., non-compliance with practice directions), it found MCAL’s lateness of lodging those trial bundles repugnant, depriving the Court and the Respondent a chance to properly read the contents and prepare for the PTR.

### Issues:

The Court considered whether a wasted costs order should be ordered against the solicitors representing the Applicants in light of the costs thrown away as a result of the adjournment of the PTR.

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<sup>2</sup> DCCJ 327/2015 was held on 21 June 2016.

## Judgment:

The Court found that the adjournment in the PTR was caused by the misconduct, default and neglect on the part of MCAL and therefore made a wasted costs order against the solicitors representing the Applicants personally.

## Reasons for Judgment:

The jurisdiction of the Court to make wasted costs orders is provided under Section 53 of the District Court Ordinance, Cap 336 (the “**DCO**”), which is equivalent to Section 52A of the High Court Ordinance, Cap 4. The term “wasted costs” is defined in Section 53(5) of the DCO as “*any costs incurred by a party as a result of (a) an improper or unreasonable act or omission; or (b) any undue delay or other misconduct or default on the part of the legal representative, whether personally or through an employee or agent of the legal representative*”. “Legal representative” is further defined under Section 53(6) as a counsel or solicitor conducting litigation on behalf of the party. Relevant guidance on applications for wasted costs orders has been issued by the Court of Final Appeal in *Ma So So v Chin Yuk Lun Francis and Chan Mee Yee* [2004] 3 HKLRD 294. (*paras 14 to 17*)

The Court’s jurisdiction should be invoked in clear cases, for example where there is “misconduct, default or even negligence which is serious and gross”, and not in cases involving dishonesty, personal obliquity or behavior such as would warrant disciplinary action being taken. The test is whether the conduct is so inexcusable and such as to merit reproof that it amounted to a serious dereliction of duty (*Chan Wai Tung v Tang Kwok Kwong & Ors*, unreported, DCPI 1503/2007, 20 October 2010; *Yau Chiu Wah v Gold Chief Investment Ltd* [2003] 3 HKLRD 553; Hong Kong Civil Procedure 2016, Vol 1, pp 1184-5, §62/8/1). (*para 18*)

When exercising its discretion as to costs, the Court is also required under O.62, r.5(1)(aa) of the Rules of the District Court (the “**RDC**”) to consider the underlying objectives set out in O.1A, r.1 of the RDC, including the costs-effectiveness of practice or procedure in relation to proceedings before the Court, the fairness between the parties and the fair distribution of resources. (*para 19*)

In terms of procedure, the Court must conduct a two-stage exercise under O.62, r.8B of the RDC pursuant to which: (1) the Court must be satisfied that it has before it, evidence or other materials which, if unanswered, would be likely to lead to a wasted costs order being made; and (2) the Court shall then consider the reasons given by the legal representative when deciding whether it is appropriate to make a wasted costs order. (*para 20*)

Here, MCAL had failed to lodge and serve the respective trial bundles on or before 15 July 2016 for all five cases. The PTR was accordingly adjourned to 3 August 2016. The Court ordered MCAL to submit written explanations as to why a wasted costs order should not be made against them personally for the costs thrown away by the adjournment. (*paras 21 to 37*)

The Court did not accept MCAL's written explanations dated 27 July 2016 as to why MCAL could not have complied with the Court's order to lodge and serve the trial bundles in time. The Court was further of the view that MCAL had the duty to proceed with the PTR and to lodge and serve the trial bundles as directed by the Court, unless and until the legal aid certificate had been discharged. MCAL's lack of response was a complete lack of respect to both the Court and the Respondent. In addition, the Court found that MCAL's request on 29 March 2016 for the extension of the legal aid certificates was for the general purpose of seeking an extension to cover the trial, and not specifically for the extension of the certificates to cover the attendance of the PTR only. MCAL only subsequently made such specific request on 7 July 2016. More importantly, the Director of Legal Aid (the "DLA") had already given a formal written reply on 8 July 2016 confirming the extension of the PTR, which MCAL never included as part of the correspondence attached to its explanation letter dated 27 July 2016. (*paras 38 to 44*)

MCAL's explanations given at the hearing were also found to be "*totally unconvincing*". While it was a genuine concern for solicitors of not being able to recover costs from the legal aid fund for any work done that is not covered by the legal aid certificates, here MCAL had hardly done anything to follow up on the issue of the extension of the certificates, and did not start preparing trial bundles even after receiving written assurance from a senior legal aid counsel on 8 July 2016 that legal aid would be extended to cover the PTR. Instead, MCAL insisted on starting work after receiving the original copies of the certificates. (*paras 45 to 54*)

The Court found it disturbing that none of the relevant correspondence between MCAL and the DLA was attached as supporting evidence to MCAL's written explanations, and such material was instead disclosed by MCAL in a piecemeal fashion during oral submissions at the hearing on 3 August 2016. As an officer of the Court, MCAL should have been more upfront and should have disclose relevant information in the first instance. In making reference to the fact that MCAL deliberately hid relevant correspondence with the DLA, the Court remarked that MCAL knew very well that they had failed to follow up with the matter and had only started to chase up the DLA for the extension of the legal aid certificates to cover the PTR at a very late stage. (*para 55*)

### **Other Considerations:**

The Court was of the view that all five cases were meritless and should have never been commenced in the first place or should have been withdrawn, including where (i) the Applicants appeared to be "economic migrants" rather than genuine torture claimants; (ii) the Applicants were domestic workers or "over-stayers" who had overstayed their visas for many years and suddenly decided to make a torture claim after arrested by the police; (iii) the Applicants were shipped in illegally by what would appear as syndicates involving with cross-border human trafficking and would immediately claim under the CAT as torture claimants upon their arrival; and (iv) some of these Applicants filed for damages claims for alleged unlawful detention despite their short period of detention. (*para 10*)

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**Legal Provisions considered:**

1. Section 53 of the District Court Ordinance, Cap 336:  
<https://v2.hklii.hk/en/legis/ord/336/s53?hl=district%20court%20ordinance%20section%2053>
2. O.62, r.5(1)(aa) and O.62, r.8B of the Rules of the District Court, Cap 336H:  
<https://www.hklii.hk/eng/hk/legis/reg/336H/>

**Key Cases cited:**

1. *Chan Wai Tung v Tang Kwok Kwong & Ors*, unreported, DCPI 1503/2007 (the test of when the Court's jurisdiction on issuing a wasted costs order should be invoked)  
<https://v2.hklii.hk/en/cases/hkdc/2010/257?hl=Chan%20Wai%20Tung%20>
2. *Ma So So v Chin Yuk Lun Francis and Chan Mee Yee* [2004] 3 HKLRD 294 (relevant guidance on applications for wasted costs orders)  
<https://v2.hklii.hk/en/cases/hkcfa/2005/8?hl=Ma%20So%20So>
3. *Yau Chiu Wah v Gold Chief Investment Ltd* [2003] 3 HKLRD 553 (the test of when the Court's jurisdiction on issuing a wasted costs order should be invoked)  
<https://v2.hklii.hk/en/cases/hkcfi/2003/1009?hl=Yau%20Chiu%20Wah%20>