

Case Summary for:
SAEED AND SECRETARY FOR JUSTICE¹

Court:	District Court (Hong Kong)
Judges:	Judge Andrew SY Li
Applicant (and Counsel):	Abid Saeed (Mr. Hectar Pun, instructed by Yip & Liu)
Respondent (and Counsel):	Secretary for Justice (Ms. Abigail Wong of the Department of Justice and Ms. Bethany Choi, Senior Government Counsel)
Date heard:	20 to 24 and 27 to 31 October, 3 and 18 November 2014 and 30 January 2015
Date promulgated:	30 January 2015
Full text:	http://www.hklii.hk/eng/hk/cases/hkdc/2015/62.html
<p>ABSTRACT: The Applicant entered Hong Kong from Pakistan illegally and was detained from 4 October 2006 to 18 January 2007. In light of the Court of Final Appeal’s decision in <i>Ghulam Rbani v Secretary for Justice</i>, the Secretary for Justice conceded before trial that the detention during this period was unlawful.</p> <p>The District Court considered the lawfulness of the Applicant’s treatment during the detention and assessed damages with regard to the unlawful detention (including being detained in overcrowded facilities not designed for long-term detention, without change of clothing, shower or brushing of teeth, having to sleep on the floor, being subjected to a foul smell due to a lack of internal toilet flushing, and not being provided with pork-free meals), unlawful handcuffing and unlawful strip/body searches. The Applicant was awarded damages in the amount of HK\$210,000, comprising HK\$100,000 for unlawful detention, HK\$30,000 for unlawful handcuffing and HK\$80,000 for unlawful strip searches.</p>	
Key words:	damages; false imprisonment; unlawful detention; trespass to person; unlawful handcuffing and body/strip searches; ordinary damages; aggravated damages; exemplary damages; whether separate head of “constitutional damages” for breach of constitutional rights available in Hong Kong

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

¹ [2015] 1 HKLRD 1030.

SUMMARY:

Facts and Procedural History:

Illegal Entry; Arrests; and Detentions

The Applicant is a Pakistani man who entered Hong Kong illegally on 4 October 2006, allegedly for the purpose of seeking asylum (the Applicant registered his refugee claim with the United Nations High Commissioner for Refugees in February 2007, with his case closed in May 2007). He was arrested by the police for illegal entry on the same day and subsequently detained at various locations from 4 October 2006 to 18 January 2007 for 107 days (the “**First Detention Period**”), after which he was released on his own recognizance:

- from 4 October 2006 to 8 October 2006, at the Lantau South Police Station;
- from 8 October 2006 to 25 October 2006, at the Castle Peak Bay Immigration Center (the “**CIC**”) during daytime and at various police stations at night;
- from 25 October 2006 to 17 November 2006, at the Ma Tau Kok Detention Center (the “**MTK**”); and
- from 17 November 2006 to 18 January 2007, at the CIC.

Please refer to Schedule 1 for a summary of the locations of the Applicant’s detention during the First Detention Period.

On 4 September 2008, the Applicant was again arrested by the police for the suspected offence of ‘breach of condition of stay by taking up unapproved employment’. On 6 September 2008, he was charged with the offence of ‘unlawful landing and remaining in Hong Kong without the authority of the Director of Immigration’ (the “**Director**”) pursuant to section 38(1)(b) of the Immigration Ordinance (Cap 115, the “**IO**”). The Applicant was detained since 8 September 2008 at the Lai Chi Kok Reception Center and was released on 9 January 2009 upon the granting of court bail (the “**Second Detention Period**”). On 27 July 2010, the prosecution offered no evidence against the Applicant and he was unconditionally discharged.

The Concession

Ten days before the commencement of the trial, following the Court of Final Appeal’s (the “**CFA**”) decision in *Ghulam Rbani v Secretary for Justice*², and in accordance with the third *Hardial Singh* principle³, the Respondent conceded that the detention during the First Detention Period was unlawful (the “**Concession**”), because “*removal of the [Applicant] would not have been possible within a reasonable time, given that the [Applicant]’s torture*

² (2014) 17 HKCFAR 138.

³ *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704.

claim was still pending". (para 34) The District Court (the "**Court**") consequently entered judgment on liability during the First Detention Period against the Respondent.

The Applicant subsequently decided not to pursue his claim for false imprisonment in respect of the Second Detention Period (the "**Withdrawal**"). It follows that the Court considered all issues in light of the Applicant's detention only during the First Detention Period (the "**Detention**").

Claim for Damages

The Applicant claimed aggravated, exemplary and/or constitutional damages for unlawful detention, unlawful handcuffing, and/or unlawful strip searches in respect of the Detention:

- body searches between 8 October 2006 and 17 November 2006, including (i) upon the Applicant's initial admission to the daytime detention at the CIC; (ii) upon each admission to the various police stations for overnight detention; and (iii) on 27 October 2006 and 13 November 2006 after each return to the MTK;
- strip searches on two occasions: (i) on 25 October 2006 upon the Applicant's initial admission to the detention at the MTK; and (ii) on 17 November 2006 upon his admission to the CIC; and
- while there was no record of handcuffing during the period between 8 October 2006 and 25 October 2006 when the Applicant was transferred between the CIC and the relevant police stations, as a matter of practice, handcuffs are used during the escort of a detainee who does not have legal stay in Hong Kong.

The Applicant had also raised (i) a torture claim under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and (ii) a non-refoulement claim on the basis of cruel, inhuman or degrading treatment or punishment ("**CIDTP**") risk and persecution risk. A removal order was issued on the Applicant but had not been executed as of the date of the hearing. Please refer to Schedule 2 for more details.

Issues:

The Applicant and the Respondent agreed on the list of issues below. (para 8)

1. False Imprisonment: Whether the Applicant's detention during the First Detention Period was unlawful;

2. Use of Handcuffs: Whether the use of handcuffs during the Applicant's transfer between different police stations and detention centres:
 - a. amounted to trespass to the person at common law; and/or
 - b. was unconstitutional in violating Article 10.1 of the International Covenant on Civil and Political Rights (the "ICCPR") (Article 6(1) of the Hong Kong Bill of Rights (the "HKBOR")) and Article 39 of the Basic Law (the "BL");
3. Body/Strip Searches: Whether the body and strip searches against the Applicant:
 - a. amounted to trespass to the person at common law; and/or
 - b. were unconstitutional in violating:
 - i. Article 28 of the BL read together with Article 41 of the BL;
 - ii. Article 7 of the ICCPR/Article 3 of the HKBOR and Article 39 of the BL;
 - iii. Article 10.1 of the ICCPR/Article 6(1) of the HKBOR and Article 39 of the BL; and/or
 - iv. Article 17 of the ICCPR/Article 14 of the HKBOR and Article 39 of the BL;
4. Section 9 of the HKBORO: Whether the Respondent could invoke section 9 of the Hong Kong Bill of Rights Ordinance (Cap 383, the "HKBORO") as a defence in respect of the issues in paragraphs 2(b), 3(b)(iii) and 3(b)(iv) above; and
5. Quantum of Damages: If the answers to the above issues were in the affirmative:
 - a. the quantum of the damages; and/or
 - b. whether or not exemplary and/or aggravated damages should be awarded and, if so, the quantum.

Except for (i) paragraph 1 (in view of the Concession and the Withdrawal) and (ii) paragraph 4 (as section 9 of the HKBORO only applied where a person is "*lawfully detained in penal establishments*"), the Court considered all of the other issues (i.e., paragraphs 2, 3 and 5), as formulated into the issues below: (*paras 13 to 16*)

1. the conditions of the unlawful detention (Issue 1);
2. the uses of handcuffs (Issue 2);
3. the body/strip searches (Issue 3); and

4. quantum for each of the above issues.

Judgment:

The Court (i) entered judgment against the Respondent in the total sum of HK\$210,000 (including HK\$100,000 for unlawful detention (Issue 1 below), HK\$30,000 for unlawful handcuffing (Issue 2 below) and HK\$80,000 for unlawful strip searches (Issue 3 below)), (ii) awarded the Applicant with post-assessment interest at the usual judgment rate, and (iii) made an order *nisi* for the Respondent to pay the Applicant the costs of the action. (*paras 338 to 341*)

Reasons for Judgment:

Issue 1: Conditions of the unlawful detention

In light of the Concession, the Court followed the approach in *A v Director of Immigration (False Imprisonment: Damages)*⁴ and *Ghulam Rbani* and considered the conditions in relation to the Detention to determine the amount of damages to be awarded to the Applicant. (*para 35*)

The Court considered the Applicant's complaints and made the following findings:

1. overcrowding:
 - the Applicant had been detained at 1/F of the CIC for 18 days (from 8 October 2006 to 25 October 2006) under “*clearly unacceptable*” overcrowding conditions, which the Respondent conceded as being “*pretty poor*”, with 70 to 80 detainees being held in two detention cells and each detainee occupying an area of only 0.63 m² (*paras 38 to 45, 52 to 58 and 118*), although the Court found that the toilet facilities were basic but reasonable and adequate (*paras 51*);
 - the Applicant had been detained at the MTK for 26 days (from 25 October 2006 to 17 November 2006), where 5 to 6 detainees were held in a cell in a size of approximately 25m². The Court did not find that the conditions at the MTK were as bad as those at 1/F of the CIC (*paras 59 to 62*); and
 - upon consideration of evidence, the Court rejected the Applicant's complaints regarding the detention conditions at 5/F of the CIC (*para 63*);
2. prolonged detention in places not designed for long-term detention:
 - it was wrong for the authorities to detain the Applicant in facilities not designed for long periods of detention which lacked basic amenities (such as 1/F of the CIC and the various police stations, which lacked basic amenities such as showers, change of clean clothes, adequate space, adequate bedding, clean blankets

⁴ [2009] 3 HKLRD 44 at paras 42 to 53, 88 and 111.

and/or internal flushing toilets), and such periods of detention “*should be kept to the absolute minimum*”; in particular, the Applicant had been placed in police cells, which were designed for detention for no longer than 48 hours, for 17 consecutive nights (*paras 64 to 74*);

- the repeated transfer between 1/F of the CIC and the various police stations created uncertainty, insecurity and hardship for the Applicant in not knowing which station he would be placed during each night (*para 74*); and
- upon consideration of evidence, the Court rejected the Applicant’s complaints regarding the detention conditions at the MTKDC (*para 72*);

3. no change of clothing, shower or brushing of teeth:

(a) taking of showers:

- the Applicant made requests to take showers during his stays at the police stations and 1/F of the CIC but such requests were never entertained, with the Applicant only having taken one shower at the MTK (but without a change of clothes) during his 44-day detention from 4 October to 17 November 2006 (*paras 76 to 86*);
- the Court considered that it was the Director’s primary responsibility to ensure that detainees were afforded basic rights, such as taking a shower on a regular basis (*para 83*):
 - it should not have been down to the detainees to make requests to take showers, or the frontline police officers to make a decision as to whether such requests should be allowed;
 - when it became apparent that shower facilities were not available at 1/F of the CIC, the Director should have made a formal request to the police for all the detainees to take a shower at the police stations; and
 - the Director should have kept proper records to ensure that detainees were afforded such basic needs; and
- insofar the Applicant’s stay at the MTK was concerned, the Court rejected the Respondent’s argument that it was unable to verify the number of shower(s) taken by the Applicant (if any) at the MTK due to missing records, as such records should have been in the Respondent’s custody at all material times (*paras 84 and 85*);

(b) change of clothing:

- the Applicant was never afforded the opportunity to change his clothes during his 44-day detention from 4 October to 17 November 2006 (*paras 87 to 93*);

- there was no evidence to suggest that the Director had a system to allow detainees to have a regular change of clothes (*para 89*);
- the Respondent had misplaced or lost the “Arrest/Detention Sheet” ID 896 form (the “**ID 896 Form**”), which contained a detailed record of the Applicant’s daily activities during the Detention (*paras 94 to 101*):
 - the Court considered it the responsibility of the public authority to keep a proper record of a detainee during his entire period of detention, including the ID 896 Form which was a “*clearly important document*”; and
 - the Respondent did not otherwise keep records to show that the Applicant was provided with a change of clothes; and
- importantly, by relying on the following principles, the Court drew an adverse inference against the Respondent for (i) the loss or destruction of documents, (ii) the failure to keep proper records, and (iii) the failure to produce the relevant documents (*paras 98 to 101*):
 - according to the maxim *omnia praesumuntur contra spoliatorem* (i.e., everything is presumed against he who destroys), the Court could draw adverse inferences against the authority where (i) there is “*insoluble doubt between any two possible versions or assessments, when the tribunal of fact is pursuing the factual issues*”, (ii) important documents went missing without any satisfactory explanations, and (iii) circumstances would have expected them to be produced; and
 - as a matter of practical reality, facts will be presumed against a person who does not produce information or a document in circumstances where he should do so;

(c) brushing of teeth: in the absence of any records kept by the Respondent, the Court found that the Applicant had never been given any toothbrush or toothpaste for use during his 44-day detention at 1/F of the CIC and the MTK (*paras 102 to 105*);

4. sleeping on floor:

- out of the 107-day Detention, the Applicant was (i) required to sleep on the floor for 3 nights (due to overcrowding in the detention cells at the police stations) and (ii) only provided with dirty blankets with foul smell that might have been infested with fleas which caused itchiness to his body (*paras 106 to 120*);

5. lack of internal toilet flush and foul smell:

- described by the Applicant as “*the worst part of his police cell experience*”, the police cells were filled with a persisting foul smell due to the lack of an internal

flushing mechanism of toilets during the Applicant's Detention (*paras 121 to 124*); and

- the Court rejected the Applicant's complaint concerning lack of privacy as a result of the built-in toilet facilities having low walls, remarking that "*a balance has to be struck between the detainees' privacy and the security of the cells as the patrolling officers need to have an unobtrusive view of what is going on within the cells itself*" and the lack of toilet tissue paper (*paras 125 to 129*);

6. no pork-free meals:

- regarding the Applicant's complaint that he had not been provided with non-pork halal food (i.e., the only food that the Applicant could consume due to religious reasons), the Court considered the evidence and found that the police and the Director had made every effort to provide non-pork diet upon request, including (*paras 131 to 152*):
 - having in place a system to order non-pork food from outside vendors and recording special dietary requests or complaints made by detainees (including using an unofficial notebook and a computer system); and
 - on isolated occasions where meals with pork were provided to the Applicant, quickly addressing the issue by providing non-pork food;
- the Court ruled that the law does not require a public authority to observe the strict religious requirements of all its detainees, and it was unrealistic (both financially and practically) to place an authority in a non-Muslim country under a burden to provide food prepared according to certain religious beliefs or laws (*para 143*).

In conclusion, the Court found that during the Detention, the Applicant:

- was detained at certain locations with overcrowding conditions (in particular 1/F of the CIC and the detention cells at the Yuen Long and Tsing Yi Police Stations);
- was detained at places not designed for long-term detention (in particular 1/F of the CIC and the police detention cells);
- was deprived the opportunity of taking showers, change of clothing and brushing of teeth;
- had to sleep on the floor for three nights out of the 107-day Detention;
- had to stay overnight at certain police cells which were overcrowded and had foul smell due to the external flushing toilet system; and
- save on a few isolated occasions, had been provided with pork-free meals.

Other than the above, the Court found that the conditions of the Applicant's detention were reasonable and acceptable. (*paras 153 and 154*)

Assessment of damages in relation to unlawful detention

Please refer to Schedule 2

The Applicant's Torture Claim and Non-refoulement Claim and the Removal Order

Prior to the hearing of this case, the Applicant raised a torture claim and a non-refoulement claim:

- first, a torture claim under the CAT in 2006:
 - which was rejected by the Director on 10 January 2011;
 - the Applicant made a petition on 24 January 2011 to the Chief Executive of Hong Kong to appeal against the Director's decision; and
 - the CE rejected the petition on 11 February 2011; and
- second, a non-refoulement claim on the basis of CIDTP risk and persecution risk:
 - the parties disputed the time when this non-refoulement claim was made; and
 - such claim was still being processed at the time of the hearing by the Court.

A removal order (the "**Removal Order**") was issued on the Applicant but had not been executed as of the date of the hearing:

- the Removal Order was issued against the Applicant on 25 February 2011 and served on the Applicant on 15 March 2011;
- on 23 August 2011, the Applicant applied for leave for judicial review to challenge the lawfulness of the Removal Order under section 19(1)(b)(ii) of the IO, but leave was refused by the Court of First Instance; and
- the Applicant appealed to the Court of Appeal but the appeal was dismissed on 11 June 2011.

Appendix A for a summary on the general principles for assessing damages for unlawful detention as set out in *Thompson v Commissioner of Police of the Metropolis*⁵, *Pham Van Ngo v Attorney-General*⁶ and *A v Director of Immigration (False Imprisonment: Damages)*; and **Appendix B** for a summary of damages awarded in relevant unlawful detention cases. (*para 258*)

While the Applicant did not make a claim for pecuniary or special damages, the Court found that the elements of a claim for ordinary non-pecuniary damages were satisfied, and awarded ordinary and aggravated damages in the amount of HK\$100,000 for the 107 days of unlawful detention. The Court considered that the aggravated damages provided adequate compensation for the Applicant and did not award exemplary damages. (*paras 265 to 278*)

Both elements of a claim for ordinary non-pecuniary damages were satisfied:

- (i) compensation for loss of liberty: (*paras 267 to 268*)
 - the Applicant was entitled to be awarded more than nominal damages for loss of liberty for the duration of the Detention of around 3.5 months; and
 - the “quality of liberty” if there had been no unlawful detention was relevant: the Applicant was an illegal immigrant arrested by the police, had no fixed abode in Hong Kong, had no valuables in his possession, and no legal right to stay or live permanently or indefinitely in Hong Kong; and
- (ii) compensation for damage to reputation, humiliation, shock, injury to feelings resulting from the loss of liberty: (*paras 269 to 273*)
 - the Court accepted the Applicant’s evidence that he felt depressed and distressed over the poor detention conditions at 1/F of the CIC, the police cells and the MTK;
 - the Court found that the “appalling conditions” of the unlawful detention must have caused humiliation, shock and injury to the Applicant’s feelings, but disagreed that the detention damaged the Applicant’s reputation as he had no family or friends in Hong Kong; and
 - prior to his arrival at Hong Kong, the Applicant had a full-time job as a supervisor in a construction company in his home country, lived with his family in a rather large house, slept in a rather spacious bedroom, and had never been imprisoned.

⁵ [1998] QB 498

⁶ unrep., HCA 4895/1990, [1993] HKLY 468 (30 July 1993)

Issue 2: Uses of handcuffs

During the Detention, the Applicant was handcuffed when he was being transferred to and from the police stations each night. The detainees were usually handcuffed in pairs in front with metal handcuffs. The Court found that but for the unlawful detention as conceded under the Hardial Singh principles, the handcuffing during the Detention would have been lawful and legitimate: (*paras 156 to 179*)

- the Court rejected the Applicant’s argument that the handcuffing caused him hardship as outside visitors at the CIC could see him being handcuffed which affected his “emotions and minds”, as the Court found that, upon consideration of evidence, the chance that any visitors would be able to see the detainees being handcuffed were extremely remote if not completely negligible and that the Applicant had grossly exaggerated his case in this respect; and (*paras 162 and 168 to 177 and 192*)
- the Court, upon considering (i) the “guidelines governing the use of handcuffs” issued by the Immigration Department and (ii) the practical reality that around 50 detainees were often transported on buses with three to four escorting officers, who did not carry with them any firearm or defensive weapon, agreed with the Respondent’s submission that the use of handcuffs during the transports only limited the Applicant’s movement to a reasonable degree and was reasonable and necessary for safety to preclude any possibility of escape from legal custody. (*paras 164 to 166 and 178*)

With respect to the Applicant’s complaint of the repeated use of the handcuffs, as the Applicant was unlawfully detained during the Detention, the Court found that there was no legal basis or justification for the handcuffing and such handcuffing amounted to battery and trespass to person at common law: (*paras 180 to 186*)

- battery was established as (i) there was actual infliction of unlawful force on the Applicant; (ii) the act of handcuffing was intentional; (iii) there need not be actual injury or damage; and (iv) there was an element of hostility (which need not be equated with ill-will), although there was no “parading” of the Applicant; and (*paras 180 to 182*)
- trespass to person was established as (i) trespass was proved but the Respondent was unable to show that he acted with lawful excuse to justify the trespass as a result of the “tainting effect” of the unlawful detention; and (ii) the Respondent was unable to rely on the statutory defence of section 67 of the Prison Rules (Cap 234A, Sub.Leg.) (the “**Prison Rules**”) which provides that mechanical restraint can be used to ensure the safe custody of prisoners during removal or while outside any prison and in legal custody. (*paras 181 to 185*)

The Court however found that the handcuffing was not in violation of the Applicant’s constitutional rights under Article 28 of the BL and Articles 3, 6(1) and 14 of the HKBOR as

the “very high threshold” of the two elements required to establish CIDTP, as set forth in the landmark case of *Ubamaka Edward Wilson v Secretary for Security*⁷, were not met. These two elements are: (*paras 187 to 192*)

- (i) ill-treatment which attains a “minimum level of severity”, which generally involves bodily injury or intensive physical or mental suffering and which must attain a minimum level of severity to come within the scope of Article 10 of the ICCPR; and
- (ii) the fact that the Applicant faces a genuine and substantial risk of being subjected to such mistreatment.

Assessment of damages in relation to unlawful handcuffing

In light of the “tainting effect” of the unlawful detention under the Hardial Singh principles, the Respondent conceded that the Applicant was in principle entitled to damages for the unlawful handcuffing and body/strip searches. The Court awarded ordinary damages, which were believed to be sufficient to reflect the loss under this head, in the amount of HK\$30,000. (*paras 279 to 301*).

- The use of handcuffs on the Plaintiff was reasonable and necessary in the circumstances. Applying *William Alan Terence Crawley v Attorney-General*⁸, the Court found that senior officers from the Immigration Department must have applied their minds to the particular circumstances of the Applicant before allowing the use of handcuffs on him. The Court found that the handcuffing would have been lawful and justifiable but for the “tainting effect” of the CFA’s decision in *Ghulam Rbani*. Nonetheless, once the detention was accepted as unlawful (i.e., the Concession), the treatment suffered by the Applicant must accordingly be treated as being unlawful. (*paras 154 and 283 to 289*)
- The Court noted that it need not consider the Applicant’s claim for exemplary damages because (i) it is trite law that such a claim must be specifically pleaded in a statement of claim and the facts relied on to support such a claim must be pleaded with proper particularity and (ii) the Applicant only pleaded the basis of the claim in its re-re-amended reply. In any event, no exemplary damages were awarded as there was no “oppressive, arbitrary or unconstitutional action by servants of the government”. (*paras 291 to 292*)
- The unlawful handcuffing caused “some unnecessary distress, indignity, mental anguish and humiliation” to the Applicant during the long daily journeys and awarded ordinary damages. There were however no aggravating factors which would justify an award of aggravated damages. (*paras 293 to 295*)

⁷ (2012) 15 HKCFAR 743

⁸ [1987] HKLR 379, 386A.

- The Court considered it inappropriate to consider the amount of damages awarded in overseas cases given the different social background, values and economic circumstances and, instead, made reference to a number of local cases in deciding to award ordinary damages in the amount of HK\$30,000: (*paras 296 to 301*)
 - HK\$4,500 was awarded for “assault and battery by unlawful handcuffing” in *William Alan Terence Crawley v Attorney-General*;
 - HK\$25,000 was awarded for a 5-hour detention and the use of handcuffs and a chain in *Leung Kwok Hung v Secretary for Justice*⁹; and
 - HK\$10,000 was awarded for the unlawful use of handcuffs in *霍兆榮對廉政公署*¹⁰.

Issue 3: Body/strip searches

The Court found that the Applicant had been subject to numerous body/strip searches on 16 occasions, which involved: (*paras 195 to 237*)

- the removal of clothing (most of the time including the removal of underwear and the Applicant being asked to perform “sitting down”, “standing up” and “putting hands on the table and doing push up” motions on approximately 10 occasions);
- touching of body by officers (in gloves) in areas like the front and back of the naked body, under the armpits and on upper thighs; and
- sometimes having one or more detainees being searched together in full view of each other at the same time (including being searched together with around ten other detainees at the same time on one occasion in the Yuen Long Police Station).

The Court commented that the only necessary body/strip searches were those that were conducted when the Applicant was (i) first arrested by the police; (ii) first admitted to 1/F of the CIC; and (iii) transferred to the MTK and 5/F of the CIC (the “**Necessary Searches**”). The other searches, which were mainly conducted when the Applicant was detained during the day at 1/F of the CIC and during the night at the various police stations from 8 to 25 October 2006, were “totally unjustified and unnecessary” because: (*paras 199 and 243 to 250 and 314*)

- after the Applicant’s clothes were removed, the officers were able to see whether the Applicant was carrying any contraband and it was unnecessary for the officers to touch the Applicant with their hands during the searches;

⁹ [2009] 4 HKLRD 247.

¹⁰ unrep., CACV 247/20026, February 2003.

- the officers' requests for the Applicant to do poses like sitting down, standing up or leaning against the table further were unnecessary and aggravated the Applicant's sense of humiliation; and
- the officials ignored and never put into writing the Applicant's requests to keep his clothes on during body/strip searches, nor did they provide any explanation when the Applicant asked why body/strip searches were required.

The Court preferred the Applicant's evidence to the Respondent's for a few reasons: (*paras 225 to 236*)

- the Applicant was consistent throughout in his allegations and was not shaken under vigorous cross-examination; (*paras 226 and 247*)
- the Court rejected several of the Respondent's arguments, including that (i) the Immigration Department lacked manpower to conduct repeated searches; (ii) the officers were required to seek instructions from superiors to conduct repeated searches; (iii) the officers must abide by rules prescribing the circumstances in which searches could be conducted; (iv) only pat-down searches were done on the detainees sent to police stations for overnight detention; (v) the Applicant was not requested to make any poses or take a shower before searches; and (vi) the Applicant was not touched by officers in a strip search done by Correctional Services Department officers upon the Applicant's transfer to 5/F of the CIC; (*paras 215 to 224*)
- the Court considered that the senior officers' evidence might not necessarily reflect the actual situation "on the ground" and preferred an experienced officer PC Lo's evidence that all detainees would be strip-searched before admission into police detention cells; (*para 227*)
- the immigration officers involved with transporting the Applicant to and from the police stations during the Detention were not called to give evidence, and none of the Respondent's witnesses was able to describe the extent to which body search was conducted on the Applicant; and (*para 240*)
- importantly, with respect to the failure on the part of the police (the custody search form) and the Immigration Department (the ID 896 Form) to keep proper written records of the body searches performed on the Applicant and give a satisfactory explanation for the missing documentation, the Court drew the reasonable inference that the documents had been destroyed inadvertently or intentionally and, in citing *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd (Practice Notice)*¹¹, emphasized the duty of parties to a litigation (including governmental departments and corporate organizations) to preserve documents. The Court commented that the lack of important

¹¹ [1968] 1 WLR 693, 694C-D

documentation “really undermines the [Respondent’s] case”. (*paras 147 and 228 to 236*)

Based on the above findings, the Court concluded that the body/strip searches: (*paras 251 to 255*)

- amounted to trespass to the person at common law;
- interfered with the Applicant’s right not to be subjected to arbitrary or unlawful search of the body, which failed to satisfy the proportionality test, contrary to Article 28 of the BL;
- constituted cruel, inhuman or degrading treatment, contrary to Article 3 of the HKBOR;
- interfered with the Applicant’s right to be treated with humanity and with respect for dignity, which failed to satisfy the proportionality test, contrary to Article 6(1) of the HKBOR; and
- interfered with the Applicant’s right to privacy, which failed to satisfy the proportionality test, contrary to Article 14 of the HKBOR.

Assessment of damages in relation to unlawful body/strip searches

The Court awarded exemplary damages in the amount of HK\$80,000 with respect to the unlawful body/strip searches against the Applicant. (*paras 302 to 321*)

- The blanket, indiscriminate and repeated strip searches done on the Applicant could not be upheld in the light of the principles laid down in *Lindley v Rutter*¹² and amounted to oppressive and arbitrary action and “outrageous conduct” that contained “elements of malice, insolence and cruelty” which justified an award for exemplary damages.
- As the Applicant had always been in custody, a pat-down search was sufficient to ascertain if the detainees were in possession of any illegal articles. Save for the Necessary Searches, there was no need or justification to conduct any strip searches, which the Court found to be “totally disproportionate to the needs”. In particular, requiring the Applicant to strip naked and be touched by the officers was “one of the most degrading and humiliating experiences a person can get” and having to do poses like standing up or sitting down while naked “would only add insult to the injury”. This would be “the same no matter what cultural background, creed or belief the detainees may have come from”.

¹² [1981] QB 128.

- According to *Brazil v Chief Constable of Surrey*¹³, an explanation should generally be given to persons subject to a personal search so that the person knows in substance the reason such a restraint on his freedom is being imposed. The Applicant was never informed of such a reason and the strip searches were conducted in breach of Rule 2(3) of Schedule 1 to the Immigration (Treatment of Detainees) Order (Cap 115E, Sub. Leg.).

The Court considered the Applicant's argument that Article 6(1) of the HKBOR and Article 35(2) of the BL provided a cause of action for breach of constitutional rights. The Court concluded that whether there is a right to constitutional damages (in addition to the conventional damages) as a result of a breach of the BL and the HKBOR remains an open question in Hong Kong. The Court held that constitutional damages should not be allowed in this case, for the following reasons: (*paras 322 to 337*)

- as the Applicant had already been appropriately compensated by common law damages, his claim with regard to the breach of his constitutional rights added nothing to his claim for damages and double recovery should not be allowed;
- the Court considered that Hong Kong law had not developed to a stage where vindicatory damages are recognized for breach of constitutional rights on top of the conventional damages awards, and, as it would not be meaningful to make reference to overseas jurisprudence due to the different social and economic backgrounds, Hong Kong should develop its own local jurisprudence and principles on this important matter; and
- the proper forum for a constitutional challenge with regard to rule 9 of the Prison Rules and section 7 of the Immigration Service (Treatment of Detained Persons) Order should be in the public law court and not the District Court.

Other Considerations: None.

Legal Provisions considered:

1. Section 67 of the Prison Rules (Cap 234A, Sub. Leg.) (rules governing the use of handcuffs on prisoners)
<https://www.elegislation.gov.hk/hk/cap234A>
2. Article 28 of the Basic Law
<https://www.basiclaw.gov.hk/en/basiclaw/chapter3.html>
3. Articles 3, 6(1) and 14 of the Hong Kong Bill of Rights
<https://www.elegislation.gov.hk/hk/cap383?p0=1&p1=1>
4. Rule 2(3) of Schedule 1 to the Immigration (Treatment of Detainees) Order (Cap 115E, Sub. Leg.).
<https://www.elegislation.gov.hk/hk/cap115E>

¹³ [1983] 1 WLR 1155.

Key Cases cited:

1. *PC International Marketing Ltd v Best Power Enterprises Ltd*¹⁴ (the Court is entitled to draw adverse inferences against the authority when (i) important documents go missing without any satisfactory explanations and (ii) circumstances would have expected them to be produced at trial) (*para 98*)
<http://www.hklii.hk/eng/hk/cases/hkca/2005/165.html>
2. *Seager v Copydex Ltd (No 2)*¹⁵ (the Court is entitled to draw adverse inference against the party who has failed to produce or destroyed documents in the event of a dispute of the factual issues) (*para 99*)
3. *Incorporated Owners of Million Fortune Industrial Centre v Jikan Development Ltd*¹⁶ (the principle that facts will be presumed against a person who does not produce information or a document in circumstances where he should do so) (*para 100*)
<http://www.hklii.hk/eng/hk/cases/hkca/2002/423.html>
4. *Collins v Wilcock*¹⁷ (the elements of assault and battery) (*para 180*)
5. *Hayward v O’Keeffe*¹⁸ (handcuffing a person without consent or lawful justification amounts to battery) (*para 182*)
6. *Leung Kwok Hung v Chief Executive of HKSAR*¹⁹ (restrictions on constitutionally protected fundamental rights must be justified on a proportionality analysis; the burden is on the authority to justify any restrictions) (*para 254*)
7. *Ubamaka Edward Wilson v Secretary for Security*²⁰ (grounds to establish cruel, inhuman or degrading treatment or punishment) (*para 188*)
<http://www.hklii.hk/eng/hk/cases/hkcfca/2012/87.html>
8. *A v Director of Immigration (False Imprisonment: Damages)*²¹ (principles of assessing damages in relation to unlawful detention)
<http://www.hklii.hk/eng/hk/cases/hkcfi/2009/2060.html>
9. *William Alan Terence Crawley v Attorney-General*²² (lawfulness of handcuffing of detainees) (*para 286*)
10. *Brazil v Chief Constable of Surrey*²³ and *Lindley v Rutter*²⁴ (power of police officers to search persons in legal custody at a police station) (*para 315*)

Schedule 1

Chronology of the Applicant’s Detention During the First Detention Period²⁵

¹⁴ [2005] 2 HKC 242 at [11]

¹⁵ [1969] 1 WLR 809, 815A-B

¹⁶ [2003] 1 HKLRD 455 at [23]

¹⁷ [1984] 3 All ER 374

¹⁸ [1993] 1 NZLR 181, 191-103

¹⁹ unrep., HCAL 107/2005, [2006] HKEC 239 (9 February 2006)

²⁰ (2012) 15 HKCFAR 743

²¹ [2009] 3 HKLRD 44

²² [1987] HKLR 379, 386A

²³ [1983] 1 WLR 1155

²⁴ [1981] QB 128

²⁵ As summarized by the Court in para 7.

<i>Date</i>	<i>Place of detention (daytime)</i>	<i>Place of detention (overnight)</i>
4 October 2006	Lantau South Police Station	Arrested by the police
4 to 8 October 2006		Lantau South Police Station
8 to 9 October 2006	1/F of the CIC (at the reception Office of Clearance Section of the Immigration Department)	Shatin Police Station
9 to 10 October 2006		Yuen Long Police Station
10 to 11 October 2006		Tuen Mun Police Station
11 to 12 October 2006		Tin Shui Wai Police Station
12 to 13 October 2006		Tsing Yi Police Station
13 to 14 October 2006		Kwai Chung Police Station
14 to 15 October 2006		Kwai Chung Police Station
15 to 16 October 2006		Yuen Long Police Station
16 to 17 October 2006		Sheung Shui Police Station
17 to 18 October 2006		Tsing Yi Police Station
18 to 19 October 2006		Lantau North Police Station
19 to 20 October 2006		Ma On Shan Police Station
20 to 21 October 2006		Sheung Shui Police Station
21 to 22 October 2006		Sheung Shui Police Station
22 to 23 October 2006		Tin Shui Wai Police Station
23 to 24 October 2006		Sheung Shui Police Station
24 to 25 October 2006		Tin Sum Police Station
25 October to 17 November 2006	The MTK	The MTK
17 November 2006 to 18 January 2007	The CIC	The CIC

Schedule 2

The Applicant's Torture Claim and Non-refoulement Claim and the Removal Order

Prior to the hearing of this case, the Applicant raised a torture claim and a non-refoulement claim:

- first, a torture claim under the CAT in 2006:
 - which was rejected by the Director on 10 January 2011;
 - the Applicant made a petition on 24 January 2011 to the Chief Executive of Hong Kong to appeal against the Director's decision; and
 - the CE rejected the petition on 11 February 2011; and
- second, a non-refoulement claim on the basis of CIDTP risk and persecution risk:
 - the parties disputed the time when this non-refoulement claim was made; and
 - such claim was still being processed at the time of the hearing by the Court.

A removal order (the "**Removal Order**") was issued on the Applicant but had not been executed as of the date of the hearing:

- the Removal Order was issued against the Applicant on 25 February 2011 and served on the Applicant on 15 March 2011;
- on 23 August 2011, the Applicant applied for leave for judicial review to challenge the lawfulness of the Removal Order under section 19(1)(b)(ii) of the IO, but leave was refused by the Court of First Instance; and
- the Applicant appealed to the Court of Appeal but the appeal was dismissed on 11 June 2011.

Appendix A General Principles for Assessing Damages for Unlawful Detention²⁶

Ordinary damages are awarded for both pecuniary and non-pecuniary damages. (*paras 257 to 259*)

- Loss of dignity and the like in the jury's or judge's discretion.
- Principal heads include the injury to liberty (i.e., loss of time on a non-pecuniary basis) and the injury to feelings (i.e., the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status and injury to reputation).

Aggravated damages will be awarded where there are aggravating features that would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award is restricted to only ordinary damages. (*paras 260 and 306*)

- Aggravating factors can include humiliating circumstances at the time of arrest or prosecution which shows that the defendant had behaved in a high handed, insulting, malicious or oppressive manner, either in relation to the arrest or imprisonment, or in conducting the prosecution.
- The court may consider the defendant's motives, conduct and manner of committing the tort and whether these have aggravated the plaintiff's damages by injuring his proper feelings or dignity and pride.
- It is a mitigating factor if the defendant has a reasonable and probable cause to its actions.
- An award of aggravated damages, though essentially compensatory in nature, contains a penal element.

Exemplary damages are awarded with the object of punishing the defendant exceptionally where there has been conduct, including oppressive or arbitrary behavior, by the defendant which deserves this exceptional remedy. (*para 261*)

- Exemplary damages should only be awarded if the compensation awarded by way of basic and aggravated damages are an inadequate punishment for the defendant and the defendant's conduct discloses malice, fraud, cruelty, insolence or the like. The Court automatically looks for "oppressive, arbitrary or unconstitutional action by servants of the government" with the main object of punishment and deterrence. (*paras 309 to 311*)

²⁶ As set out in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, *Pham Van Ngo v Attorney-General* (unrep., HCA 4895/1990, [1993] HKLY 468) (30 July 1993), and *A v Director of Immigration (False Imprisonment: Damages)* [2009] 3 HKLRD 44 (CFI).

- A claim for exemplary damages must be specifically pleaded in the body of the statement of claim, and the facts relied on to support such a claim must be pleaded with proper particularity (*para 291*).

In assessing damages, a global approach is to be preferred to a rateable approach. Damages should be awarded by reference to a progressively reducing scale. (*para 262*)

The award can be relatively substantial for a very short period of false imprisonment; whilst for any further period of unlawful detention the progressively reducing scale should be very steep. (*para 276*)

Appendix B Summary of Damages Awarded in Unlawful Detention Cases²⁷

<i>Case (applicant)</i>	<i>Length of detention</i>	<i>Damages awarded</i>
<i>A v Director of Immigration (False Imprisonment: Damages) (A)</i>	3 months	HK\$80,000
<i>A v Director of Immigration (False Imprisonment: Damages) (AS)</i>	21.5 months (655 days)*	HK\$150,000
<i>A v Director of Immigration (False Imprisonment: Damages) (F)</i>	20.5 months (634 days)*	HK\$180,000
<i>A v Director of Immigration (False Imprisonment: Damages) (YA)</i>	5 months (156 days)	HK\$100,000
<i>Ghulam Rbani v Secretary for Justice, at the District Court</i>	1.5 months (46 days)*	HK\$30,000
<i>Ghulam Rbani v Secretary for Justice, at the CFA</i>	10 days*	HK\$10,000
<i>Faridha Sulistyoningih v Mak Oi Ling Karen²⁸</i>	4 months	HK\$60,000

*Preceded by a period of imprisonment for criminal convictions. Please refer to para 274 for details.

²⁷ As summarized by the Court in paras 274 to 276.

²⁸ unrep., DCPI 1575/2005, [2007] 3 HKLRD H12, [2007] 3 HKLRD H13 (4 April 2007).