

立法會

Legislative Council

LC Paper No. LS7/08-09

Paper for the Panel on Security

Information Note on the judgment of 'A' & others v Director of Immigration (CACV No. 314 to 317 of 2007)

At the meeting of the Panel on 14 October 2008, a member referred to a recent judgment of the Court of Appeal 'A' v Director of Immigration (CACV No. 314 of 2007) and requested the Legal Service Division to provide information on the main points. (a soft copy of the case is available at the website of the Judiciary: http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2007/CACV000314_2007.doc)

Background of the case

2. The case concerns the exercise of power by the Director of Immigration to detain persons under section 32 of the Immigration Ordinance (Cap. 115) ("the Ordinance") after they have made claims under Article 3.1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("The Convention"). Article 3.1 of the Convention provides that:-

"No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

3. The applicants in the appeal, 'A', 'AS', 'F' and 'YA', were subjects of deportation orders or removal orders issued under the Ordinance. Each of them had made a claim under Article 3 of the Convention to the effect that, if returned to their countries, they would be tortured or killed ("Convention claim"). They were detained by the Director of Immigration under section 32 of the Ordinance whilst awaiting the final determination of their claims. In the Court of First Instance, 'A' instituted proceedings by way of judicial review to quash the decision of the Director not to release him from detention. 'AS' and 'F' sought the same remedies and each sought a declaration to the effect that their detention was unlawful. 'YA' brought proceedings by way of habeas corpus. On 15 June 2007, Hartmann J dismissed all the applications, holding that the detention was lawful under domestic law and compliant with Article 5 of Hong Kong Bill of Rights (HCAL 100/2006 and 10,11 and 28/2007). The Applicants appealed.

The Appeal

4. In this appeal, the Court of Appeal ("the Court") was concerned with the power of detention under the Immigration Ordinance after the making of the Convention claims. The Applicants' contention that their detention was unlawful was the subject of the proceedings.

5. The Court allowed the appeal and declared that the detention was unlawful.

6. In the appeal, the applicants relied on Article 5 of the Hong Kong Bill of Rights ("HKBOR") which provides that:

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

Requirement of certainty and accessibility of grounds and procedure of detention

7. One of the issues before the Court was the legality of the power of detention under section 32 of the Ordinance. The section provides for detention pending removal or deportation. The Court noted that the detention under section 32 was not mandatory or automatic, but the section was silent on how or the circumstances under which the power to detain pending removal should be exercised. The Court held that Article 5 of the HKBOR requires that the grounds and procedure for detention are sufficiently certain (or precise) and accessible, and noted that these could be made certain by a policy and accessible by publication. The Court was of the view that a clear and lawful policy would ensure that the Director, when deciding whether or not to detain, would have considered all relevant circumstances and that the decision would not be arbitrary. The availability of grounds for detention would also enable an applicant to know how best to ensure that he was not detained. The Court remarked that the grounds and procedure could be made certain by a policy and accessible by publication. The Court also remarked that making of a policy is not the only way. Legislation, whether substantive or subsidiary, may do as well (paragraphs 41 to 44 of judgment).

8. A paper submitted to the Legislative Council by the Administration was referred to during submission on the point of whether there was a policy on the exercise of the power to detain. Counsel for the Director of Immigration had two alternative submissions. The primary submission was that the Director did not have a policy. The alternative submission was that the Director did have a policy and that it was accessible. The policy is said to be contained in a document headed "Supplementary information in relation to situation of refugees, asylum seekers, and torture claimants", supplied to the Legislative Council, by LC Paper No. CB(2)526/06-07(01). The policy is said to be contained in para. 17 of this document which reads:

“17. In considering whether to grant recognizance in lieu of detention, ImmD will taken into account (a) whether the person concerned constitutes a security risk to the community; (b) whether there is any risk of the person absconding and (re)offending; and (c) whether removal is not going to be possible within a reasonable time. As a rough indication, some 4% of the detainees were detained because they failed to meet 1 criterion; some 60% could not meet all the three criteria and the rest failed to meet either two of the criteria.”

Counsel for the Director submitted that although this was a statement of the policy, this should not be taken as an exhaustive statement. The Court noted that there was an English Court of Appeal case which held that the detention was unlawful because the policy was not accessible in its entirety, and added that it was not prepared to assume that paragraph 17 contains a sufficient statement of policy, nor would a reader of paragraph 17 realise that it was supposed to contain a statement of the Director’s policy on detention of a convention claimant under section 32. In any event, the Court was not satisfied that the paper was accessible to persons in detention. The Court accepted the submission of the counsel for the applicants that a person in detention would not have access to the Internet, and did not believe that the guideline could be said to be accessible (paragraphs 53 to 61 of judgment).

Implication of the judgment

9. Pursuant to this decision, detention of persons under section 32 of the Immigration Ordinance would be unlawful if there were no certain and accessible grounds and procedure for the exercise of the power to detain. It would thus be necessary for the Administration to take steps either in making a policy which is certain and accessible, or in introducing legislation, to state how or the circumstances under which the power to detain pending removal should be exercised. Also, in the light of this decision, it would perhaps be appropriate for the Administration to consider a review of provisions relating to exercise of power of detention on their compatibility with Article 5 of HKBOR.

Prepared by

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