

Case Summary for:  
**ABBAS SYED MANZAR v DIRECTOR OF IMMIGRATION<sup>1</sup>**

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<b>Court:</b>	Court of First Instance (the “ <b>Court</b> ” or the “ <b>CFI</b> ”)
<b>Judges:</b>	Hon Coleman J
<b>Applicant (and Counsel):</b>	Abbas Syed Manzar (acting in person)
<b>Respondent (and Counsel):</b>	Director of Immigration (the “ <b>Director</b> ”) (Mr Alvin Hor instructed by the Department of Justice)
<b>Date heard:</b>	6 October 2022
<b>Date promulgated:</b>	6 October 2022
<b>Full text:</b>	<a href="https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2022/3063.html">https://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2022/3063.html</a>
<p><b>ABSTRACT:</b> The Applicant was subject to a removal order and detained under section 32(3A) of the Immigration Ordinance (Cap. 115, the “<b>IO</b>”) pending removal from Hong Kong. The Applicant made an application for a writ of habeas corpus. At the time of the hearing, the Applicant had been detained for 308 days. The Court reviewed the Applicant’s detention against the <i>Hardial Singh</i> principles and ruled that the Applicant had been detained for a period that is reasonable pending removal, dismissing the application.</p>	
<b>Key words:</b>	administrative law; habeas corpus; detention pending removal; whether continuing detention unreasonable; reasonable diligence and expedition to effect removal

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

<sup>1</sup> [2022] HKCFI 3063; also cited as HCAL 904/2022; [2022] HKCU 4947

## SUMMARY:

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### Facts and Procedural History:

The Applicant, a Pakistani national, entered Hong Kong illegally twice:

- the first time: he entered Hong Kong on May 15, 2010, and was removed under a removal order on July 26, 2011; and
- the second time: he entered Hong Kong on July 24, 2014, and was arrested on July 27, 2014. He was referred to the Immigration Department (the “ImmD”) on July 30, 2014, and detained until August 27, 2014, when he was released on recognizance. A removal order was issued against the Applicant on May 14, 2018.

The Applicant made the following torture claim, non-refoulement claim, petition and applications for judicial review:

- On the Applicant’s first illegal entry to Hong Kong, the Applicant made a claim under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on May 26, 2010, which was refused on December 9, 2010 and his petition against the refusal was dismissed on May 31, 2011. Thereafter, he was removed from Hong Kong.
- On the Applicant’s second illegal entry to Hong Kong, the Applicant lodged a non-refoulement claim (the “NRC”) on July 24, 2014. The NRC was rejected by the Director on February 2017, and then by the Torture Claims Appeal Board (the “TCAB”) on April 4, 2018.
- The Applicant sought leave from the CFI to challenge the TCAB’s decision by way of judicial review on June 13, 2018, and the CFI refused leave on February 15, 2019. The Applicant applied to the Court of Appeal (the “CA”) on February 27, 2019, and the CA dismissed the appeal on June 21, 2019. The Applicant made further applications to the CA and the Court of Final Appeal (the “CFA”), and the CFA dismissed his application for leave to appeal on February 3, 2021.
- The Applicant made a subsequent claim on March 31, 2021, which was rejected by the Director on August 3, 2021. The Applicant applied to the CFI for leave to judicial review of the Director’s refusal on August 24, 2021. On September 28, 2021, the CFI refused the leave application and made a Restricted Proceedings Order (“RPO”) which prohibits the Applicant from commencing fresh proceedings related to his NRC without first obtaining leave from the Court for him to do so.
- The Applicant produced a draft notice of appeal stating the intention to further pursue the application for leave to apply for judicial review, but the Court noted that such draft

seemed not to have been filed at the Court. No leave has been sought or granted for such notice of appeal.

- On December 3, 2021, there was no live NRC or any related legal proceedings, the release on recognizance was revoked, and the Applicant was detained since then under section 32(3A) of the IO pending removal. At the time of the hearing, the Applicant had been detained for 308 days.

The Applicant's detention had been reviewed five times during the period of detention (on January 13, 2022, March 2, 2022, May 20, 2022, August 15, 2022 and September 26, 2022). On each occasion, continued detention was recommended, and the same grounds were relied on for the recommendation in all the reviews: (1) the Applicant's removal was going to be possible within a reasonable time, (2) the Applicant did not have a close connection or fixed abode in Hong Kong, and (3) there were no other circumstances in favor of his release.

With respect to the latest review on September 26, 2022, the Director also considered the following: (1) there was no outstanding NRC or related legal proceedings and a RPO had been imposed on the Applicant; (2) he had no family connection in Hong Kong; (3) an emergency passport had been obtained for the Applicant, making him ready for re-entry, and (4) a removal flight had been tentatively arranged for October 14, 2022 (subject only to the Applicant's application for habeas corpus), therefore the release on recognizance was not warranted.

On September 13, 2022, the Applicant applied for a writ of habeas corpus (although the application was dated September 9, 2022).

### **Issues:**

Whether the detention had become unlawful in light of the *Hardial Singh* principles outlined at §164 of the judgment in *Harjang Singh v Secretary for Security*<sup>2</sup> as set forth in the Appendix to this summary.

### **Judgment:**

The Applicant continued to be lawfully detained. The Applicant's application for writ of habeas corpus was, therefore, dismissed.

### **Reasons for Judgment:**

The Court reviewed the Applicant's detention against the *Hardial Singh* principles as set forth below and ruled that the Applicant had been detained for a period that is reasonable pending removal:

(HS1) the Secretary/Director must intend to deport the person and can only use the power to detain for that purpose;

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<sup>2</sup> [2022] HKCA 781

(HS2) the deportee may only be detained for a period that is reasonable in all the circumstances;

(HS3) if, before the expiry of the reasonable period, it becomes apparent that the Secretary/Director will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; and

(HS4) the Secretary/Director should act with reasonable diligence and expedition to effect removal.

The Court found that the Director did intend to remove the Applicant and that the power of detention was being used for that purpose, so HS1 was satisfied. (*para 35*)

The Court found that the Director had acted with reasonable diligence and expedition to effect removal, as the ImmD made persistent efforts in enabling the Applicant's re-entry into Pakistan by taking steps to facilitate the Applicant's repatriation since October 2019, which included arranging for an emergency passport (issued on September 23, 2022 and expiring on October 22, 2022) and securing a seat on a repatriation flight scheduled on October 14, 2022, so HS4 was satisfied. (*paras 23-26 and 36*)

The Court noted that there had been no live NRC or related judicial review proceedings at any point in the present period of detention, and the only obstacle was the need for a replacement travel document, so HS3 was satisfied. (*para 37*)

The Court acknowledged that a portion of the period of detention was largely due to the Applicant's own-making by refusing to cooperate in obtaining a replacement document, and that the ImmD had secured a seat on a repatriation flight scheduled the week after the hearing, therefore the Applicant had been detained, and will likely be further detained, only for a period that was reasonable in all circumstances, so HS2 was satisfied. (*paras 35, 38 and 39*)

The Court also considered the following factors:

- The Court noted that the Applicant's application papers did not seek to identify why the detention had become lawful, but focused on why he could go back or ought not to be sent back to Pakistan, which was not the relevant question which the Court should address. (*para 30*)
- The Court considered the attachments to the Applicant's application noting that the Applicant was a psychiatric patient suffering from panic attacks when he travelled by public transport and the Applicant had depression. The Court was of the view that the material did not amount to medical opinion evidence which would support a view that the Applicant was unfit to travel as a result of any recognized medical condition, or that there was any medical impediment to his removal. The question of whether or how the Applicant should be returned to Pakistan was not a relevant question for the Court. (*paras 31-33*)

**Legal Provisions considered:**

1. Sections 19(1)(b) and 32(3A) of the IO: <https://www.elegislation.gov.hk/hk/cap115>

**Key Cases cited:**

2. Harjang Singh v Secretary for Security and Another [2019] HKCFI 1486  
<https://v2.hklii.hk/en/cases/hkcfi/2019/1486?hl=Harjang%20Singh>

## Appendix

### *Hardial Singh principles as outlined in Harjang Singh v Secretary for Security*

- (1) The central question on an application for habeas corpus is whether there is, and continues to be, lawful authority for a detention.
- (2) An originally lawful detention may cease to be lawful if it continues for an unreasonable period in the particular circumstances.
- (3) What is a 'reasonable time' will therefore depend upon the circumstances of the particular case, taking into account all relevant factors.
- (4) The lawfulness of detention, or continuing detention, is subject to potential objective review by the Court. But the review is not a review as to *Wednesbury* unreasonableness, or on other public law grounds.
- (5) Either continuing detention is reasonable and so lawful, or it is not. Though the Court's review involves an exercise of judgment and balance, that is not a discretionary decision.
- (6) Hence, the Court is the judge of, and the primary decision maker as to, the reasonableness of the detainee's continued detention.
- (7) The burden of showing that detention is lawful lies upon the Secretary and Director.
- (8) The assessment will be made in line with the 'Hardial Singh principles', namely that:
  - (HS1) the Secretary/Director must intend to deport the person and can only use the power to detain for that purpose;
  - (HS2) the deportee may only be detained for a period that is reasonable in all the circumstances;
  - (HS3) if, before the expiry of the reasonable period, it becomes apparent that the Secretary/Director will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; and
  - (HS4) the Secretary/Director should act with reasonable diligence and expedition to effect removal.
- (9) Any relevant factor may affect the length of time of detention that might be regarded as reasonable. Whilst in a specific case one or more factors may have especial weight, no factor is necessarily determinative.
- (10) A review of what might be regarded as a reasonable period of detention will include at least: (a) the length of the period of detention; (b) the nature of the obstacles which

stand in the path of the Director preventing a deportation; (c) the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles; (d) the conditions in which the detained person is being kept; (e) the effect of detention on him and his family; (f) the risk that if he is released from detention he will abscond (which may have the effect of defeating the deportation order); and (g) the danger that, if released, he will commit criminal offences.

- (11) It is helpful first to identify and have firmly in mind the period of detention to date, before balancing the various other factors and risks against that period. This is because the weight to be given to the other factors and risks will vary as the period of detention increases in length.
- (12) Though it might seem attractive to set guideline periods or a red line (in terms of months or years) applicable to all cases, as to the circumstances in which a lawful detention becomes unreasonable and hence unlawful, no such guidelines can be set. Indeed, any attempt to do so is unhelpful. Reference to the facts of other cases is also likely unhelpful.
- (13) Nor would it be correct to think that the longer any period of detention, the greater the scrutiny that would be applied to it. Every deprivation of liberty pending deportation requires proper scrutiny of all the facts, in accordance with the Hardial Singh principles, which are the sole guidelines.
- (14) The risks of absconding and reoffending are of critical and paramount importance in the assessment of the lawfulness of the detention.
- (15) This is because if a person absconds, it will defeat the primary purpose for which the power to detain has been conferred, and for which the detention order was made in the particular case.
- (16) However, a very careful assessment of the risk must be made in each case, as the magnitude and potential impact of that risk will vary according to the circumstances.
- (17) The risk of absconding is distinct from the risk of committing further offences, and not dependent on that further risk
- (18) The risk of reoffending requires its own distinct assessment, by reference to both its likelihood and seriousness.
- (19) Neither risk can justify detention of any length, as that would permit indefinite detention.
- (20) The longer the detention, the greater the risk necessary to justify it.
- (21) The Court will rigorously scrutinize the Secretary/Director's assessment of risk on both grounds, and the weight to be given to that assessment will include consideration as to how convincing the reasoning is.

- (22) When assessing (a) the probability that removal can be effected at all and (b) the proximity of the time to removal, a real sense of the timescale likely to be involved must be identified to be able to qualify it as reasonable.
- (23) There must be a sufficient prospect of removal to warrant continued detention, having regard to and balanced against the weight of all other circumstances of the case.
- (24) As the period of detention gets longer, the greater the degree of certainty and proximity of removal would be expected to be required in order to justify continued detention.
- (25) On any appeal from a first instance decision of the Court, the appellate court will not interfere with the judge's decision unless it can be shown that what is a difficult exercise of judgment is inconsistent with his findings of primary fact, or was based on an incorrect understanding of the law, or was one that was not sensibly open to him on the basis of those facts. The leeway given to the first instance judge is not as a result of the view that he has made a discretionary decision, but rather as a reflection that the balancing exercise can be difficult.