

Case Summary for:
ALLAH DITTA v DIRECTOR OF IMMIGRATION¹

Court:	Court of First Instance (Hong Kong)
Judges:	Hon Coleman J
Applicant (and Counsel):	Allah Ditta (acting in person)
Respondent (and Counsel):	Director of Immigration (Mr Sunny Li, Senior Government Counsel, and Mr Frenki Fung, Senior Government Counsel (Ag.), of the Department of Justice)
Date heard:	18 July 2022
Date promulgated:	4 August 2022
Full text:	http://www.hklii.hk/eng/hk/cases/hkcfi/2022/1505.html
<p>ABSTRACT: This was the second application for a writ of habeas corpus made by the Applicant (the “Application”). The first application ([2021] HKCU 1592, the “First Application”) and the Applicant’s subsequent appeal ([2022] HKCU 3659, the “Appeal”) were rejected.</p> <p>The Applicant is a Pakistani national who remained in Hong Kong past his limit of stay. He served a two-year prison sentence for the offence of handling stolen goods, and was detained after release from prison, during which a deportation order was made against him. The Applicant was released on recognizance after five months of detention, but was subsequently arrested due to the offence of taking employment when a deportation order was in force against him. He was sentenced to 15 months’ imprisonment, and detained after his release. During his detention, the Applicant pursued a non-refoulement claim that was rejected and sought judicial review for such rejection, but leave for judicial review was rejected. The Applicant then made the First Application and the Appeal, and the present Application. By reference to the matters at the time of the Application, the Court of First Instance (the “CFI”) held that the originally lawful detention of the Applicant had by now continued for a period which had become unreasonable, and was therefore unlawful.</p>	
Key words:	Administrative Law; Habeas corpus; Detention under Immigration Ordinance; Pending removal; Whether has become unlawful

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

¹ [2022] HKCU 3784

SUMMARY:

Facts and Procedural History:

The Applicant is a Pakistani national whose father was a Hong Kong permanent resident. On 7 March 2008, the Applicant first entered Hong Kong for residence as a dependent of his father. The Applicant's limit of stay in Hong Kong was last extended until 17 February 2012. His father died in 2011, and his extension of stay was rejected. The Applicant was convicted of the offence of handling stolen goods and on 11 July 2013 he was sentenced to two years' imprisonment.

Between 17 April 2014 (the date of the Applicant's release from prison) and 15 September 2014, the Applicant was detained under the Immigration Ordinance Cap 115 (the "IO"). During this period:

- (1) A deportation order (the "**Deportation Order**") was made against the Applicant on 17 June 2014 under section 20(1)(a) of the IO.
- (2) An emergency passport was issued on 26 June 2014 by the local Consulate General of Pakistan for the Applicant's return to his home country.
- (3) By letters dated 16 June, 7 July and 23 July and 11 September 2014, the Applicant signified an intention to make a non-refoulement claim (the "**NRC**").
- (4) On 3 September 2014, the Applicant's repatriation to Pakistan was not successful by reason of his resistance.

On 15 September 2014, the Applicant was released on recognizance. On 30 April 2019, the Applicant was arrested while on recognizance for taking employment with a deportation order and sentenced to 15 months' imprisonment.

On 23 March 2020, the Applicant was discharged from prison.

- (1) From 23 March 2020 to 25 March 2020, the Applicant was detained under section 32(3) of the IO pending his removal from Hong Kong under the Deportation Order.
- (2) On 25 March 2020, the Applicant requested to pursue the NRC. The Director of Immigration (the "**Director**") resumed processing of the NRC.
- (3) From 25 March 2020 to 28 May 2020, the Applicant was detained under section 37ZK of the IO pending the final determination of the NRC.
- (4) On 22 April 2020, a completed Non-refoulement Claim Form was received by the Director.
- (5) On 6 May 2020, a screening interview of the Applicant in respect of NRC was conducted.
- (6) On 14 May 2020, the Director rejected the NRC.
- (7) On 28 May 2020, the Director treated the NRC as having been finally determined under 37V of the IO in view of the fact that no notice of appeal/petition was received

- by the Torture Claims Appeal Board/Non-refoulement Claims Petition Office (the “**Board**”).
- (8) From 28 May 2020 to 16 July 2020, the Applicant was detained under section 32(3) of the IO pending his removal from Hong Kong under the Deportation Order.
 - (9) On 9 June 2020, the Board informed the Director that it had received the Applicant’s late filing of a notice of appeal/petition (the “**Petition**”) on 8 June 2020. The Board accepted the late filing of the Petition, and decided to give priority to the Applicant’s case.
 - (10) From 16 July 2020 to 14 September 2020, the Applicant was detained under section 37ZK of the IO pending the final determination of the NRC.
 - (11) On 14 September 2020, the Board dismissed the Petition (“**Board’s Decision**”). From 14 September 2020 onwards, the Applicant had been detained under section 32(3) of the IO pending his removal from Hong Kong under the Deportation Order.
 - (12) On 28 September 2020, the Applicant sought leave to apply for judicial review of the Board’s Decision (the “**JR Application**”). The JR Application, and subsequent attempts to apply for judicial review, were rejected.
 - (13) On 26 March 2021, the Applicant made the First Application for a writ of habeas corpus. The CFI held that the Applicant’s detention was prima facie lawful, and *Hardial Singh* compliant. The Court of Appeal rejected the Applicant’s Appeal as well.
 - (14) Further reviews of his detention by the Director and/or the Secretary for Security (the “**Secretary**”) were performed since the previous judgments.
 - (15) On 26 April 2022, the Applicant submitted the present Application.
 - (16) On 14 June 2022, an update was provided by the Director to the Secretary that the Applicant emergency passport had been extended until 12 July 2022, and that there was no outstanding legal impediment hindering his deportation.
 - (17) On 16 June 2022, the Secretary notified the Director that, balancing the individual circumstances, it was considered that there were grounds for continued detention. The circumstances include:
 - a. no indication that the subject cannot be removed within a reasonable period of time given that there is no outstanding legal impediment hindering his deportation and the emergency passport was extended.
 - b. the Applicant is a repeated and serious crime offender, and a deportation order had been made against and his presence in Hong Kong is considered undesirable.
 - c. There is considerable risk of the subject’s absconding because he had record of failing to comply with the conditions of recognizance.
 - d. There is no doubt on the subject’s true identity, and he had an elder sister and three step-brothers who are HKPRs.
 - e. There were no other circumstances in favour of release.
 - (18) The Applicant was notified of the outcome of the review of detention by a Notice of Review of Detention dated 28 June 2022.
 - (19) On 27 June 2022, the Director sought a further review by the Secretary, in light of the fact that the Applicant had filed his Notice of Motion dated 22 June 2022 seeking leave to go to the Court of Final Appeal. The Secretary notified the Director of his view on 6 July 2022 that there were grounds for continued detention.

- (20) In an internal memo dated 13 July 2022, the Immigration Department officers again determined that the case was not one warranting release on recognizance in lieu of detention.

Issues:

Whether the period of detention is too long by the time of the assessment, and therefore unlawful.

Judgment:

The CFI held that the originally lawful detention of the Applicant had by the time of the hearing continued for a period which had become unreasonable, and was therefore unlawful. The CFI ordered the Applicant to be released from detention on terms of recognizance acceptable to the Director.

Reasons for Judgment:

The starting point was that the Applicant had been held in detention for around 28 months, which was a period longer than the total period of his imprisonment. (*para 54*)

Whether the period of detention is too long involves balancing (a) the gravity of risks from his/her release from detention against (b) the breach of the principle of liberty. The longer the detention is (or may be), the greater the risk will have to be to justify it. In other words, as the period of detention continues, the weight given to the level of risk decreases. (*para 58*)

The CFI stated that the analysis in the reviews of detention must change as the period of detention goes on, and observed that the Director/Secretary's review of detention review was not robust, up-to-date assessment as to the level of risk and consequences of reoffending – the “*essential reliance by the Director and Secretary was on the (mere) fact of past offending – and that it occurred more than once, so was “repeated”.*” Accordingly, the CFI held that the level of risk and consequences of reoffending and absconding by the time of the case no longer justified continued detention. (*para 55, 56, 59 and 60*)

Regarding the Director's argument that the Applicant might already have been released from detention following removal had he not launched the application for leave to go to the CFA, the CFI agreed that the application was of little merit, but the counterpoint was that, even if the application might not be anticipated to be one of great merit, the time for it to be dealt with may be more significant because it arose after an already lengthy period of detention. (*para 62*)

All in all, the period of 28 months in the overall circumstances, including the Applicant's ties to the community and the ability to exact appropriate conditions for a release on recognizance,

it was both possible and appropriate to state that continued detention was no longer lawful.
(para 63)

Legal Provisions considered:

1. Ss. 32(3), 37ZK, 37V Immigration Ordinance [Cap 115](#);
2. [RHC](#) Order 54 rule 1.

Key Cases cited:

1. *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB) (an applicant would be entitled to a writ of habeas corpus or an order for release if he/she was not able to be deported or removed by the immigration authority within a reasonable time)
<https://www.bailii.org/ew/cases/EWHC/QB/1983/1.html>
2. *Harjang Singh v Secretary for Security* [2022] HKCA 781 (A review of the reasonableness of the length of detention will depend upon the circumstances of each case and all relevant factors, including at least (1) the length of the period of detention; (2) the nature of the obstacles which stand in the path of the Director preventing a deportation; (3) the diligence, speed and effectiveness of the steps taken by the Director to surmount such obstacles; (4) the conditions in which the detained person is being kept; (5) the effect of detention on him and his family; (6) the risk that if he is released from detention he will abscond (which may have the effect of defeating the deportation order); and (7) the danger that, if released, he will commit criminal offences.)
<http://www.hklii.hk/eng/hk/cases/hkca/2022/781.html>